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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1863

DONALD WINSTON HARPER, NEIL WILSON ROWE, JAMES MERRILL BURDINE, JOHN WHITE, DAVID RAY JENKINS, DAVID RAYMOND GOVUS, DONALD ALFRED BLACK, GARY REGAN TALBERT, RICHARD LEWIS JACKSON, MICHAEL BENJAMIN FORBES and ROBERT McNEILL HERRING,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Donald Winston Harper, Neil Wilson Rowe, James Merrill Burdine, John White, David Ray Jenkins, David Raymond Govus, Donald Alfred Black, Gary Regan Talbert, Richard Lewis Jackson, Michael Benjamin

Forbes, and Robert McNeill Herring respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 13, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reproduced in the Appendix. That opinion, in its footnote 4, incorporated part of the opinion in *United States v. Coats,* 611 F.2d 37 (4th Cir. 1979), *cert. den.* April 21, 1980, No. 79-1230, and that part is also reproduced in the Appendix. The District Court did not render an opinion. Two Orders of the District Judge and six Memoranda and Recommendations of the Magistrate are also reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 13, 1980. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on March 26, 1980. It then stayed its mandate on April 2, 1980 pending the filing of an application for certiorari. The Chief Justice entered an order on April 17, 1980 extending the time for filing a petition for writ of certiorari to and including May 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the stopping, boarding and searching without probable cause or even reasonable suspicion and without a warrant of an American fishing vessel on the

high seas 800 miles off the coast of the United States by a Coast Guard cutter whose primary mission was marijuana law enforcement can be justified under the Fourth Amendment as a border search, an administrative search or a "necessary" search.

2. Whether the stopping without probable cause or even reasonable suspicion of cars traveling on a highway in the general vicinity where a raid on a marijuana unloading operation had occurred three hours earlier violated the Fourth Amendment.

3. Whether statements given by fatigued seamen who were in custody but deliberately not taken before a magistrate, who were discouraged from seeking counsel, and who were promised consideration if they cooperated and threatened with stiff sentences if they did not, were involuntary and therefore obtained in violation of due process.

4. Whether a voice identification obtained in jail of a defendant who had been arrested without probable cause should have been excluded as the fruit of the unconstitutional arrest.

5. Whether the failure of the District Judge to make a de novo determination of the Magistrate's recommendations on motions to suppress evidence — because he did not personally hear the evidence, did not even review the transcript of the hearing, and did not enter orders on most of the motions — violated Article III, the Sixth Amendment, and the Federal Magistrates Act, 28 U.S.C. section 636.

6. Whether the conspiracy to import marijuana ended with the seizure of the vessel transporting the marijuana and the arrest of her crew, or with the completion of the importation, so that persons who became involved only

thereafter in the distribution of the marijuana could not be convicted of the completed conspiracy to import it.

7. Whether the presence of three persons in a house belonging to one of them in the general vicinity of a marijuana unloading operation, or the presence three hours later on a nearby highway of two other persons driving in opposite directions in cars rented in a fictitious name used by one of the persons in the house, constituted sufficient acts to further a conspiracy to import marijuana to prove beyond a reasonable doubt that those persons were members of the conspiracy.

8. Whether a prima facie case for violating the Fifth and Sixth Amendments and the Jury Selection and Service Act of 1968, 28 U.S.C. sections 1861-1871, was established by a showing that the District Court used a list of actual voters as the sole source of names for jury selection and that practice resulted in a non-cross-sectional jury with an under-representation of black, young and low socio-economic status persons.[1]

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[1]Conditional Questions Presented: Petitioners would like to reserve their right to argue the following questions if certiorari is granted, but do not present them as reasons for issuing the writ:

(A) Whether the search of a house that followed an unconstitutional entry onto the property and occupation of the house while a search warrant and purported consent were obtained violated the Fourth Amendment because: (i) the affidavit in support of the warrant did not establish probable cause to believe that evidence would be found in the house as opposed to the vicinity outside the house, and (ii) the purported consent was given involuntarily by an elderly frail and ill man who was in custody for eleven hours but had not been given his medicine, any food or rest, and was not told of his right to refuse consent, and who, although a nominal lessee with his son of the property, did not live in or control the house, and who believed that he was consenting only to a search of the property outside of the house;

(B) Whether the identifications of petitioners Black and Burdine were sufficient to support their convictions;

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Constitutional provisions involved are Article I, Section 1, Article III, and the Fourth, Fifth and Sixth Amendments to the United States Constitution. The statutory provisions involved are 14 U.S.C. sections 89 and 143, the Federal Magistrates Act, 28 U.S.C. section 636, and the Jury Selection and Service Act of 1968, 28 U.S.C. sections 1861, 1862, 1863(a), 1863(b)(2) and (3), and 1867(a). The regulatory provision involved is 19 C.F.R. section 162.3(a) (1977). These are set out in the Appendix, as permitted by Rule 23(1)(d).

STATEMENT OF THE CASE

Petitioners were convicted in the United States District Court for the Eastern District of North Carolina, after a bench trial, of conspiracy to import marijuana into the United States in violation of 21 U.S.C. sections 952(a) and 960(a)(1). They filed pretrial motions for suppression of evidence seized in several searches and of statements given by two of them. The Magistrate held an evidentiary hearing on the suppression motions and issued Recommendations on each. Petitioners filed timely written objections to

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(C) Whether petitioner Black's statement identifying himself in response to a question from an arresting officer after his arrest and before he had been advised of his *Miranda* rights was obtained in violation of the Fifth and Sixth Amendments; and

(D) Whether a notebook seized from the house at Back Creek was improperly admitted into evidence because the Government produced no evidence to identify it or its author or to show that it related to the conspiracy and because it constituted hearsay not subject to confrontation by cross-examination.

Not all of the facts relevant to these conditional questions are detailed in this petition.

those Recommendations. The District Judge did not hear the testimony or even read the transcript of the motions hearing, A. 250A, 253A,* and issued Orders on only two of the motions, denying them.

I. Operation Stopgap

In the fall of 1977, the Drug Enforcement Administration (DEA) established a marijuana mission called "Operation Stopgap". The purpose was to coordinate the efforts of DEA, the Customs Service, the Coast Guard, the El Paso Information Center and the Immigration and Naturalization Service in an effort to seize vessels transporting marijuana from Columbia to the United States and to arrest the crews aboard the vessels. Pursuant to Operation Stopgap, the Coast Guard deployed one cutter in each of the three principal passages used by vessels traveling between South America and the United States. The plan was for DEA aircraft to observe marijuana loaded onto vessels in Columbia, follow the vessels until they headed for one of the three passages, then notify the appropriate Coast Guard Cutter to stop and board the vessel.

Pursuant to Operation Stopgap, the Coast Guard Cutter Alert was assigned to patrol the Mona Passage between Puerto Rico and the Dominican Republic. The principal purpose of the Alert's mission was marijuana law enforcement.

The Alert arrived in the Mona Passage on January 13, 1978. There it found little traffic and received no intelligence from DEA. The Captain therefore decided to

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*"A." refers to the Appendix filed in the Court of Appeals. "App." refers to the Appendix to this petition.

board every American vessel under 250 feet in length. A. 336-337, 445-446. Pursuant to that shipboard decision, the Alert made six boardings. It found no violations of any kind on the first five ships boarded.

After dark on January 26, 1978, the Alert encountered a shrimp trawler. The Alert's helicopter reported that she was a fishing vessel between seventy and eighty feet in length named the Lady Ellen, and that she was from North Carolina. By checking with the El Paso Information Center, the Alert determined that the Government had no information about the vessel. Thus, the Coast Guard had no information that the vessel or her crew was involved in any law violation or had recently crossed the American border. A. 342C, 445-446. Moreover, the Coast Guard did not have a warrant or other judicial authorization to stop, board or search any vessel. Nevertheless, the Captain of the Alert radioed the Lady Ellen to heave to, and dispatched a boarding party of four officers.

The boarding party was transported to the Lady Ellen in a small boat operated by a coxswain and two other persons. Each member of the boarding party carried a pistol and one person in the boat had a riot shotgun. Over an hour after ordering the Lady Ellen to heave to, the Coast Guard party boarded her. The boarding was hazardous because of rough seas, and succeeded only with the help of the crew on the Lady Ellen.

On board the vessel, the boarding officer identified himself to the crew, which consisted of the Captain, Paul Breslin, and petitioners Harper and Rowe,[2] and asked: "Where are you coming from and going?" Breslin an-

[2]The crew had been assembled and was acting under the direction of petitioner Govus.

swered, "You've got me. We are coming from Columbia and are loaded with marijuana." An officer advised the crew of their *Miranda* rights and then searched the vessel thoroughly to locate the marijuana. He found it in the main hold.

II. The Controlled Delivery

The Coast Guard took custody and control of the Lady Ellen and her cargo, operating her with a Coast Guard crew. Breslin, Harper and Rowe were kept on the Lady Ellen under armed guard that night. Already fatigued from twenty days at sea in rough weather, they got little sleep. The next morning, January 27, 1978, they were transferred to the Alert.

The Coast Guard knew that both the Coast Guard Boarding Manual and Rule 5 of the Federal Rules of Criminal Procedure required that their prisoners be taken before a Magistrate. They also knew that there was a Magistrate in Puerto Rico and that the ship's helicopter could take them there. Nevertheless, the Coast Guard Commander at shore headquarters made a high-level decision deliberately not to have Harper and Rowe taken before a Magistrate in order to protect plans to use them to conduct a "controlled delivery" of the marijuana. A. 302, 304-304B.

A helicopter brought DEA agent Felix Jimenez on board the Alert from Puerto Rico to arrange the controlled delivery. Customs Patrol Officer Martinez, who had been on the Alert, read the crew their *Miranda* rights. They said that they understood them and signed *Miranda* waivers.

Agent Martinez instructed the three crew members that it was necessary for them to cooperate. He and Agent

Jimenez told them that if they did cooperate in helping catch other persons, the Government would not be interested in them and "would talk to the judge in a consideration for them." A. 401. The agents also told the crew members that if they were taken to Puerto Rico they would get high bonds and stiff sentences of five to ten years, but that on the mainland the judges were more lenient in marijuana cases and would give probation. A. 162, 463. Breslin and Harper asked about a lawyer. Agent Jimenez told them that would ruin the deal – "it's either you cooperate and you make the convoy, or you go to Puerto Rico and we charge you and you can have your lawyer." A. 838. That night Harper and Rowe gave written statements that were introduced in evidence against them.[3] They also agreed to cooperate in the controlled delivery.

Several days later Breslin, Harper and Rowe were put back on the Lady Ellen under Coast Guard surveillance. Radio messages to the Lady Ellen, monitored by the Coast Guard, directed the Lady Ellen to the North Carolina area. The Government stipulated that "Breslin, Harper and Rowe imported marijuana into the United States through the Beaufort Channel at approximately 9:00 P.M. on February 4, 1978."[4] A. 99, 101. Another person then came on board the Lady Ellen and steered the vessel to Back Creek. That person wore winter clothing, including a parka with a hood mask that covered his face. Breslin later met petitioner Forbes in jail, questioned Forbes, and recognized his voice., On that basis, he identified Forbes as the person who piloted the Lady Ellen to Back Creek. He had never seen Forbes before.

[3]Breslin also gave a statement. He testified as a Government witness at trial in exchange for immunity.

[4]The Government further stipulated that "Breslin, Harper and Rowe were working on behalf of the United States from January 27, 1978 until February 5, 1978." A. 99.

The trip to Back Creek took six hours. At 3:00 A.M. the Lady Ellen dropped anchor. Several boats came alongside and a number of men boarded and unloaded the cargo. Petitioner Govus came on board and told Breslin to monitor the radio for lookouts.

After an hour, two radio calls reported small boats approaching at high speed. Govus told Breslin to get the vessel underway, and he did. A law enforcement boat stopped the Lady Ellen in the Intracoastal Waterway, however, and arrested the three crew members and four others, including Petitioners Black and Burdine, on board.

III. The Searches at Back Creek

Several law enforcement officers converged on the Back Creek area by land. They approached it on a narrow rural dirt road. State Bureau of Investigation (SBI) Agent Charles I. Overton, III and DEA Agent Edward R. Hinchman arrived first, at 4:00 A.M., followed by DEA Agent Odis Rousseau and several others. They drove until the road was blocked by an abandoned house trailer and a chain gate. On a nearby tree the property was "Posted Keep Out." They removed the chain and entered the property.

Agents Overton and Hinchman walked about 75-100 yards from where the road was blocked to a dock with a wooden shed nearby. A boat tied up at the dock had marijuana on it. Two large van type trucks were backed up within five or ten feet of the dock. A pickup camper and smaller trucks were nearby. Hinchman and Rousseau looked in the trucks and saw no contraband in them. The trucks were lined with plastic bagging held in place by duct tape.

The agents saw an elderly man who appeared frightened and feeble lying face down in a marshy area nearby. The temperature was cold and there was ice on the marsh. The man was Peter Forbes, a 65-year-old commercial fisherman who had severe high blood pressure, had suffered a stroke just six months earlier, and needed to take considerable medication every day. The agents lifted him by his arms and arrested him.

The agents saw three occupied houses in the area and approached one that was 75-100 yards from the dock. They climbed onto the porch, knocked on the door, identified themselves and asked if they could come in. A voice from inside said, "Come in." The officers opened the door and entered. Petitioners White, Jackson and Jenkins were inside wearing heavy work clothes and long rubber boots. The agents arrested all three. On a coffee table were a CB transceiver and a scanning radio receiver, which were common for people to have in that area. There were also a pair of work gloves and flashlights on the couch. Hinchman asked White to produce his wallet. He looked in the wallet and read the name "Leroy Joseph Edwards", and gave the wallet back. He asked Jackson whether he lived in the house and Jackson answered that he did.[5]

The agents set up the house as the command post for the law enforcement operation. Two or three hours later, a deputy sheriff saw petitioner Michael Benjamin Forbes standing on the roadside near the driveway to the house, where he lived, and arrested him.

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[5]The property and house were leased by Peter Forbes and his son, petitioner Michael Benjamin Forbes, for a commercial fishing operation that they ran along with Jackson. Michael Benjamin Forbes and Jackson lived in the house.

IV. "Operation Stopcars"

DEA Agent Johannesen and SBI Agent Paul Bateman drove to a place on the main highway about one mile from the dirt road to Back Creek. They parked off the road in the woods. Their purpose was to stop every car going in either direction. They did not block the road; instead they concealed themselves in the woods until a car approached, then pulled into the road and put a blue light on the dashboard of their unmarked car to signal the other car to stop.

The agents stopped several cars. In most cases, they merely noted information from the licenses of the drivers. The first car that the agents stopped was driven by a nurse. The next car was driven by petitioner Talbert. It was going northbound, in the general direction of, rather than away from, the raid site, on the route it would follow if it were coming from any number of places, including the Town of Beaufort, the several places surrounding it, and all points south. This was during daylight, three hours after the raid.

The agents pulled their cars into the road and stopped the car that Talbert was driving. They asked for his driver's license and registration. He produced his North Carolina driver's license and a rental agreement that revealed that the car had been rented from Raleigh Rent-A-Wreck by LeRoy Edwards.

Agent Johannesen testified that the agents "did not have probable cause" or even suspicion to stop the Talbert car. A. 698-699, 706. They stopped it just because they were stopping all cars. A. 705, 706.

Other officers arrived and parked their cars in the highway. Petitioner Herring approached from the north (the direction of the Town of Merriman and also the dirt

road to the house at Back Creek) driving a gray Plymouth. The officers stopped his car. They requested his driver's license and vehicle registration. He produced a Georgia driver's license and a lease agreement from Rent-A-Wreck of Raleigh, also in the name of LeRoy Edwards. Agent Bateman testified that he did not believe the officers had probable cause to stop or arrest Herring. A. 754.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, OF OTHER COURTS OF APPEALS, AND OF STATE COURTS ON THE CONSTITUTIONALITY OF THE STOPPING AND BOARDING OF A VESSEL ON THE HIGH SEAS WITHOUT PROBABLE CAUSE OR EVEN REASONABLE SUSPICION AND WITHOUT A WARRANT.

This case presents important questions that are being raised in a rapidly increasing number of cases regarding the constitutionality of Coast Guard searching activity at sea. The decision below is in conflict with decisions of this Court and of other federal and state appellate courts on those questions.

In this case, the Coast Guard officers who stopped and boarded the Lady Ellen were engaged in a law enforcement operation concentrating on marijuana smuggling. They had no search warrant and no information identifying the Lady Ellen as involved in marijuana, fisheries, safety, documentation or any other violations. The stop occurred on the high seas 800 miles from the United States, and the Coast Guard had no information that the Lady Ellen had recently crossed any American border.

A. Conflicts as to Standards for Searches at Sea.

The decision below upholding the constitutionality of that action is in direct conflict with the decision of this Court in *United States v. Lee,* 274 U.S. 559, 562-563 (1927); see also, *Little v. Barreme,* 6 U.S. (2 Cranch) 170, 179 (1804). In *Lee,* this Court stated: "Officers of the Coast Guard are authorized . . . to board and search [American vessels on the high seas] when there is probable casue to believe them subject to seizure for violation of revenue laws . . . . The authority asserted is not as broad as the belligerent right to visit and search even without probable cause." *United States v. Lee, supra* at 562-563.[6] The decision below is also in conflict with the recent decision of the Ninth Circuit in *United States v. Piner,* 608 F.2d 358 (9th Cir. 1979), which held that a Coast Guard stopping and boarding of a boat in San Francisco Bay for a routine safety and document inspection after dark requires "at least a reasonable and articulable suspicion of noncompliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer." *Id.* at 361. Similarly, in *United States v. Odneal,* 565 F.2d 598 (9th Cir. 1977), the Ninth Circuit upheld a Coast Guard stopping of a vessel for a safety inspection because it had observed dangerous safety violations. The Court said that if the stopping were not for that purpose, the Coast Guard

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[6]The decision below is also in direct conflict with a series of prohibition era decisions in the Second Circuit that followed *Lee* and held that probable cause is required for Coast Guard boardings to look for violations of the prohibition law. *Fish v. Brophy,* 52 F.2d 189, 200-201 (S.D. N.Y. 1931); *United States v. Coppolo,* 2 F.Supp. 115, 116-117 (D. N.J. 1932); *United States v. Powers,* 1 F.Supp. 458, 460 (E.D. N.Y. 1932); see also, *United States v. Hayes,* 52 F.2d 977, 978 (E.D. N.Y. 1931); *United States v. 63 Kegs of Malt,* 27 F.2d 741, 742 (2d Cir. 1928); *Arch v. United States,* 13 F.2d 382, 384 (5th Cir. 1926).

would need to have at least a "founded suspicion that the vessel was engaged in illegal activity." *Id.* at 601 n.2; see also, *United States v. Rubies,* 612 F.2d 397, 402, 404 (5th Cir. 1979), *cert. pending,* Nos. 79-1297 and 79-5954. The same Court, in *United States v. Stanley,* 545 F.2d 661 (9th Cir. 1976), upheld a Coast Guard boarding on the ground that it was a border search. *Id.* at 667. The Court indicated that away from the border or its functional equivalent the Coast Guard would need probable cause. *Id.* at 664.

Two state courts have reached similar results. *People v. Nissen,* 97 Misc.2d 1000, 412 N.Y.S.2d 999, 1003-1007 (Sup. Ct. 1979); *Casal v. State,* 375 So.2d 1077, 1078 (Fla. App. 1979). In addition, in *Klutz v. Beam,* 374 F.Supp. 1129 (W.D. N.C. 1973), a three-judge Court in the Fourth Circuit held that safety inspections of private boats may not be conducted by state officers without regard to the warrant requirement of the Fourth Amendment.

In upholding the Coast Guard search activity, the decision below appears to be in accord with Fifth Circuit decisions allowing the Coast Guard to stop and board vessels without probable cause, but that Circuit has generally done so only for safety and documentation inspections, a procedure not presented in this case.[7] The Fifth Circuit has required at least a "reasonable suspicion of illegal activity" for a stopping and boarding conducted for purposes other than a safety and documentation inspec-

[7] *United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978) (*en banc*); *United States v. Hillstrom,* 553 F.2d 209, 210 (5th Cir. 1976); *United States v. Odom,* 526 F.2d 399, 342 (5th Cir. 1976); see also, *United States v. Cadena,* 585 F.2d 1252, 1257 (5th Cir. 1978), rehg. den. 588 F.2d 100 (5th Cir. 1979); *United States v. Freeman,* 579 F.2d 942, 946 (5th Cir. 1978); *cf., United States v. One 43 Foot Sailing Vessel,* 538 F.2d 694 (5th Cir. 1976), *aff'g.* 405 F.Supp. 879, 883 (S.D. Fla. 1975).

tion. *United States v. Serrano,* 607 F.2d 1145, 1147-1148 (5th Cir. 1979); *United States v. Whitmire,* 595 F.2d 1303, 1308, 1315, 1316 (5th Cir. 1979), *cert. pending,* No. 79-375; *United States v. Cortes,* 588 F.2d 106, 110-111 (5th Cir. 1979); *United States v. Cadena, supra* at 1263 n.23; *United States v. Freeman, supra* at 342; see also, *United States v. Acosta,* ____ F. Supp. ____, ____ (S.D. Fla. 1980), 27 Cr.L.Rptr. 2100.

In a recent summary decision, however, the Fifth Circuit upheld a random Coast Guard stopping and boarding for a safety and documentation inspection where the officers also wanted to inspect for obvious customs and narcotics violations. *United States v. Erwin* (5th Cir. July 3, 1979), slip opinion at 2. The Court said that "the Coast Guard has plenary authority to board a vessel beyond the twelve-mile limit without probable cause or any particularized suspicion." *Id.*

The defendants in *Erwin* filed a petition for certiorari in this Court, but did so three days out of time. *Erwin v. United States,* No. 79-579. The Government filed a Brief in which it took the following position:

> "[W]e do not oppose the petition for certiorari in light of the substantial importance of the issue presented and the uncertainties created by this Court's decision in *Prouse* and the Ninth Circuit's decision in *Piner.*" *Id.,* Brief for the United States at 9.

The Government suggested, however: "The Court may nevertheless wish to consider whether review should be declined on account of the untimeliness of the petition in this case." *Id.,* Brief for the United States at 9 n.6. On February 19, 1980 this Court denied certiorari without comment. *Id.,* 100 S.Ct. 1014 (1980).

This Court should grant certiorari in this case to resolve the conflict between the Fourth and perhaps the Fifth Circuits on the one hand and the Second and Ninth Circuits and the state courts on the other on this issue, which the Government in its *Erwin* brief correctly characterized as an important one.

B. Conflicts as to Border Searches.

The decision below upheld the stopping and boarding under an amalgam of theories: border search, administrative or regulatory search, and high seas or necessary search. None of those theories is justified on the facts. See Comment, 93 Harv. L.Rev. 725, 750, 751 (1980).

The Court of Appeals said: "[W]e hold that the stop and boarding was lawful, absent any particularized suspicion of criminal activity aboard, because it was undertaken as a systematic 'border' stop and inquiry." App. 4a-5a. That rationale is in conflict with the basic principle of border search doctrine.

The stopping and boarding was conducted on the high seas more than 800 miles and ten days sailing from the border — outside of the United States — not at the border or its functional equivalent. See *Almeida-Sanchez v. United States,* 413 U.S. 266, 272-273 (1973). The "critical fact [for a border search] . . . that the [person or item] cross the border and enter this country," *United States v. Ramsey,* 431 U.S. 606, 616 (1977), was not established. See *United States v. Whitmire, supra* at 1307-1308. The officers had no reason to believe that there had been a crossing into the country and certainly not a recent one. The American nationality of the vessel suggested that it may have exited the country at some unknown time in the past but the officers had no reason even to suspect that it carried contraband at that time.

The decision below, concluding that the stopping and boarding could be justified as a border search "albeit 800 miles at sea," App. 7a, without citing a single supporting precedent effectively declared international waters to be the equivalent of the American border, thus exempting all searches at sea from the Fourth Amendment. The effect is that Coast Guard boardings of American vessels at sea are subject to no standards or restrictions. This Court has never approved unconstrained searches of that kind or suggested any rationale for doing so. See *Delaware v. Prouse,* 440 U.S. 648, 661 (1979).

C. Conflicts as to Administrative Searches.

The stopping and boarding was a major time-consuming operation conducted by armed officers at night under hazardous conditions, including an interrogation of the master and a search throughout the vessel, for the principal purpose of detecting violations of the marijuana laws. It was not an administrative or regulatory search for enforcement of the navigation, safety or administrative laws. See *Torres v. Puerto Rico,* 442 U.S. 465, 473 (1979). In the only two cases in which this Court has upheld an administrative search on that ground, the search was conducted solely for the purpose of enforcing extraordinary regulatory objectives. *United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970); see *Almedia-Sanchez v. United States,* 413 U.S. 266, 271 (1973); see also, *Marshall v. Barlow's Inc.,* 436 U.S. 307 (1978). Moreover, the administrative or regulatory search doctrine does not authorize a forcible search. It has only been used to uphold statutes making it an offense to refuse admission to an inspector. *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 77 (1970).

The decision to stop and board every United States vessel under 250 feet in length was made solely by the officer in the field, the Captain of the Coast Guard Cutter. Operation Stopgap assigned to the Cutter the responsibility of stopping only vessels that it had probable cause to believe were smuggling marijuana. The probable cause was to be obtained primarily by DEA air surveillance, and also by earlier intelligence about the vessels, or by the suspicious circumstances of the vessels. The Captain decided on his own to board all vessels because the DEA had not notified him of any vessels to stop and because there was little traffic in the Mona Passage.

D. Conflicts as to "Necessary" Searches.

The Government made no showing of a critical need for authority to conduct boardings for either criminal law or safety and documentation purposes without a warrant and probable cause or reasonable suspicion. Cf., *Almeida-Sanchez v. United States, supra* at 273 n.5. One central teaching of *Delaware v. Prouse,* 440 U.S. 648, 658-661 (1979), is that the necessity must be demonstrated, not merely asserted, to have any effect on a Fourth Amendment analysis.

The only official governmental position on the appropriate standard for Coast Guard boardings is the Treasury Department Regulation in 19 C.F.R. section 162.3(a) (1977), which provides:

> "A customs officer [which includes a Coast Guard officer enforcing the Customs law, 14 U.S.C. §89(b), 19 U.S.C. §§1401(i), 1709(b)], for the purpose of examining the manifest and other documents and papers and examining, inspecting

> and searching the vessel, may at any time go on board: . . . .
>
> "(2) Any American vessel on the high seas, when there is probable cause to believe that such vessel is violating or has violated the laws of the United States . . . ."

14 U.S.C. section 89(a) authorizes the Coast Guard to stop and board American vessels on the high seas, but it does not define the circumstances under which that authority may be exercised. The statute provides that Coast Guard officers "may at any time go on board of any vessel" and the regulation specifies the standard for the exercise of that authority by declaring that they "may at any time go on board any American vessel on the high seas when there is probable cause." The Government's position in *United States v. Lee, supra,* was also that probable cause was required.

By upholding the Coast Guard conduct as constitutional, the decision below yielded to the predictable law enforcement pressures for relaxation of Fourth Amendment standards in order to make it easier to convict marijuana importers. This Court, by contrast, has repeatedly refused to dispense "with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement." *Torres v. Puerto Rico,* 442 U.S. 465, 474 (1979). Thus, this Court has refused to abandon Fourth Amendment requirements in connection with threats to domestic security, *United States v. United States District Court,* 407 U.S. 297 (1975), and the smuggling of firearms, explosives and narcotics, *Torres v. Puerto Rico, supra,* and aliens, *Almedia-Sanchez v. United States, supra* at 273-274, as well as with regard to murder, arson,

rape, robbery and burglary. *E.g., Mincey v. Arizona,* 437 U.S. 385, 394 (1978); *Michigan v. Tyler,* 436 U.S. 499, 508 (1978). No reason appears why it should do so with regard to alleged importation of marijuana.

II.

THE STOPPING WITHOUT PROBABLE CAUSE OR EVEN REASONABLE SUSPICION OF CARS IN THE GENERAL VICINITY WHERE A MARIJUANA UNLOADING OPERATION HAD OCCURRED THREE HOURS EARLIER RAISES AN IMPORTANT FOURTH AMENDMENT QUESTION.

This Court has repeatedly held that the non-consensual search of an automobile that is not in police custody may be accomplished only when the officers have probable cause or at least " 'some quantum of individualized suspicion.' " *Delaware v. Prouse,* 440 U.S. 648, 654-655 (1979); *Almeida-Sanchez v. United States,* 413 U.S. 266, 270 (1973); *Chambers v. Maroney,* 399 U.S. 42, 47-48, 49 (1970); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 221-222 (1968); *Carroll v. United States,* 267 U.S. 132, 159-160 (1925). The Court has applied that requirement to the stopping of an automobile as well as the searching of it. *Henry v. United States,* 361 U.S. 98, 103 (1959); *Brinegar v. United States,* 338 U.S. 160, 176 (1949); see also, *Rios v. United States,* 364 U.S. 253, 261-262 (1960); *Potter v. United States,* 362 F.2d 493, 499 (5th Cir. 1966). "Automobile or no automobile", the Court said in a case involving the validity of the stopping of one, "there must be probable cause for a search." *Almedia-Sanchez v. United States,* 413 U.S. 266, 269 (1973). The Court stated recently that "probable cause has not been abandoned as a requirement for stopping and searching an automobile." *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 315 n.10 (1978).

The probable cause (or suspicion) must be "individualized", *Delaware v. Prouse, supra,* that is, directed towards the particular individual or vehicle to be searched or seized. *Ybarra v. Illinois,* 100 S.Ct. 338, 342 (1979); *Brown v. Texas,* 443 U.S. 47, 51-52 (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543, 555-556 (1976); *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 882 (1975).

In this case, two law enforcement officers decided to stop every car traveling on the main highway in the vicinity of the raid site regardless of whether the car was going towards or away from the raid site and regardless of whether the officers had any reason to single out the particular car. They decided to hide in the woods in their unmarked car, wearing plain clothes, and drive into the highway to surprise and stop each car that passed. Pursuant to that plan, the officers stopped several cars. Two of the cars that they stopped were driven by petitioners Talbert and Herring. They were traveling separately in opposite directions. The stopping occurred three hours after the raid. As the officers admitted, they had no reason to single out the Talbert or Herring cars from the rest of the traffic on the highway that morning, and certainly did not expect any suspects to be driving towards the raid site so long after the raid.

The decision below upheld the stopping of the cars on the following rationale:

> "A serious crime had been committed involving numerous participants, some of whom were known to be fleeing the scene along a route reasonably expected to be used for their escape. Stopping all cars there was, under the circumstances, a necessary means of law enforcement, and as such, justifies the minimal intrusion on privacy rights posed to passing motorists." App. 13a.

That holding ignored the Fourth Amendment requirement for an individual justification for the intrusion on the privacy of any particular individual, and did so simply because of an asserted law enforcement need. The officers had only a generalized suspicion that some persons traveling on the highway might have been escaping from the raid site. Even in a high crime area, the officers must have information singling out a specific individual or vehicle. *Torres v. Puerto Rico,* 442 U.S. 465, 467 (1979); *Brown v. Texas,* 443 U.S. 47 (1979); *Almeida-Sanchez v. United States, supra* at 273 n.5. Citizens do not forfeit their Fourth Amendment rights because, however innocently, they happen to be in the vicinity of criminal activity involving several persons.[8] In holding otherwise, the decisions below is in conflict with the decisions of other courts of appeals. *E.g., United States v. Carrizola-Gaxiola,* 523 F.2d 239, 241 (9th Cir. 1975); see also, *United States v. Montgomery,* 561 F.2d 875, 886 (D.C. Cir. 1977). Even if a law enforcement need could justify such dragnet stops in some circumstances, the decision by individual agents in the field, rather than by supervisory officials, without "a plan embodying explicit, neutral limitations on the conduct of individual officers," *Brown v. Texas, supra* at 51, using unmarked cars and wearing plain clothes, hiding and driving out to surprise passing cars going in *either* direction, without advance notice by prominent signs, does not qualify as an appropriate method to accomplish the purpose. *Cf., Delaware v. Prouse, supra* at 661, 663; *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976).

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[8]The requirement that probable cause be particularized cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Ybarra v. Illinois, supra.*

III.

BECAUSE THE STATEMENTS OF HARPER AND ROWE WERE INVOLUNTARY, THE DECISION BELOW UPHOLDING WITHOUT DISCUSSION THEIR USE AT TRIAL IS IN CONFLICT WITH SEVERAL DECISIONS OF THIS COURT.

Petitioners Harper and Rowe raised and fully briefed in the Court of Appeals the question of the involuntariness of their statements. The decision below rejected their arguments without discussion, saying simply: "We acknowledge the numerous issues raised by various appellants but find no reversible error in any of them." App. 14a.

The involuntariness of the statements of Harper and Rowe was established by the totality of six circumstances. Harper and Rowe: (1) were fatigued from their voyage in rough weather; (2) were confined in a restricted area and got little sleep; (3) were deliberately not taken before a Magistrate although the Coast Guard had a helicopter available to transport them to one in Puerto Rico; (4) were promised "consideration" in connection with the charges against them if they cooperated; (5) were threatened with stiff sentences in Puerto Rico if they did not cooperate; and (6) were told, when they asked about a lawyer, that if they wanted a lawyer they could not have "the deal." The decision below upholding without discussion the use of those statements is in conflict with several decisions of this Court. *E.g., Brady v. United States,* 397 U.S. 742, 753 (1970); *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961); *Haynes v. Washington,* 373 U.S. 503, 505-515 (1963); *Lynum v. Illinois,* 372 U.S. 528, 534 (1963); *Mallory v. United States,* 354 U.S. 449 (1957); *McNabb v. United States,* 318 U.S. 332 (1943); *Bram v. United States,* 168 U.S. 532, 542-543 (1897).

The Government argued that the admission of these statements constituted harmless error. Brief for Government at 75. "But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process 'even though there is ample evidence aside from the confession to support the conviction.' " *Mincey v. Arizona,* 437 U.S. 385, 385, 398 (1978).

IV.

THE USE IN EVIDENCE OF THE VOICE IDENTIFICATION OF PETITIONER MICHAEL BENJAMIN FORBES WHICH WAS THE FRUIT OF HIS ARREST WITHOUT PROBABLE CAUSE RAISES AN IMPORTANT QUESTION LEFT UNANSWERED THIS TERM IN *UNITED STATES V. CREWS.*

Petitioner Michael Benjamin Forbes was arrested by a deputy sheriff three or four hours after the raid. He was on the road leading to his house, where the deputy sheriff knew that he lived. The deputy sheriff had no information connecting Forbes with the marijuana operation and therefore arrested him without probable cause.

The evidence against Forbes was developed later in the day. Forbes was jailed with Breslin, who was then a Government informer. Breslin questioned Forbes and identified Forbes by his voice alone as the pilot wearing the cold weather mask who had met the Lady Ellen and steered her to Back Creek. He identified Forbes in court solely on the basis of having recognized his voice in jail and having seen his face at that time. That identification was inadmissible as the fruit of an unconstitutional arrest. *Dunaway v. New York,* 442 U.S. 200 (1979); *Brown v. Illinois,* 442 U.S. 590 (1975); *Wong Sun v. United States,* 371 U.S. 471 (1963).

In *United States v. Crews,* 100 S.Ct. 1244 (1980), this Court reaffirmed that "the exclusionary sanction applies to any 'fruits' of a constitutional violation," *id.* at 1249, including photographic and lineup identifications resulting from an unconstitutional arrest ("both of which", the Court said in that case, "are conceded to be suppressible fruits of the Fourth Amendment violation . . . ." *Id.* at 1250). *Crews* held, however, that a courtroom identification by a witness who formed her identification of the defendant at the time of the crime and before his arrest was independent of the later violation of the defendant's Fourth Amendment rights. In the present case, however, Breslin's in-court identification was based solely on his seeing Forbes in jail while hearing his voice. Accordingly, this case raises the precise issue that the Court did not have to reach in *Crews.*

V.

THE FAILURE OF THE DISTRICT JUDGE TO MAKE A DE NOVO DETERMINATION OF THE MAGISTRATE'S RECOMMENDATIONS ON THE SUPPRESSION MOTIONS RAISES IMPORTANT QUESTIONS UNDER THE FEDERAL MAGISTRATES ACT AND THE CONSTITUTION.

The Federal Magistrates Act prohibits a Magistrate from determining a motion to suppress evidence in a criminal case but authorizes him to conduct evidentiary hearings on such a motion and to submit to the Judge proposed findings of fact and recommendations for disposition by the Judge. 28 U.S.C. §636(b)(1)(B). The Act specifies: "A judge of the Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636(b)(1). The Act confers a limited role on the Magistrate. He "may do no more than propose a recom-

mendation," which does not carry even presumptive weight. *Mathews v. Weber,* 423 U.S. 261, 270-271 (1976). "The authority – and the responsibility – to make an informed, final determination, we emphasize, remains with the judge." *Id.* at 271.

The Magistrate conducted an evidentiary hearing for eleven days on the suppression motions in this case and filed his recommendations by June 22, 1978. Petitioners filed timely objections to them by June 30, 1978. The District Judge did not hear any of the evidence presented in connection with the suppression motions and did not even review the transcript of the motions hearing. Nevertheless, on July 3, 1978, he issued an order denying the motion challenging the search of the Lady Ellen at sea. On July 5, 1978, the District Judge entered an order denying in part and granting in part the motion challenging the stopping of the cars driven by Talbert and Herring.

The District Judge issued no orders with regard to the rest of the suppression motions. Thus, there is no disposition by the District Judge of those motions, as required by 28 U.S.C. section 636(b)(1)(B). *Cf., Swisher v. Brady,* 438 U.S. 204, 208, 209, 210, 216 (1978). Even as to the two motions on which the District Judge did issue orders, those orders did not comply with the Act because the District Judge did not make a de novo determination after petitioners filed objections to the Magistrate's recommendations.

In *United States v. Raddatz,* 592 F.2d 976 (7th Cir. 1979) the Seventh Circuit held that Due Process requires the District Judge as the trier of fact in a hearing on a motion to suppress evidence, to hear the evidence personally "in order to ensure a meaningful determination of the facts." *Id.* at 982; see also, *United States v. Bergera,* 512 F.2d 391, 393-394 (9th Cir. 1975). This Court granted cer-

tiorari in *Raddatz,* No. 79-8, and oral argument was held on February 25, 1980. Like *Raddatz, id.* at 983, the present case was a criminal case in an Article III Court in which credibility evidence was central to the determination of material issues of fact. Due Process and Article III entitled petitioners to have those issues determined by the District Judge and only after personally observing and hearing the witnesses, testify.

In this case, however, not only did the District Judge fail to hear the evidence personally, he failed even to read the transcript of the evidence taken before the Magistrate. The Fourth, Fifth and Ninth Circuits have held that the "judge must himself review the entire record before the District Court, consider the magistrate's report, and satisfy himself that the recommended disposition is fair and proper." *Bowman v. Bordenkircher,* 522 F.2d 209, 210 (4th Cir. 1975); *Campbell v. District Court,* 501 F.2d 196, 206 (9th Cir. 1974); *McKinney v. Parsons,* 488 F.2d 452, 453 (5th Cir. 1974). The District Judge did not comply even with that standard.

VI.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF TWO OTHER COURTS OF APPEALS ON WHETHER THE CONSPIRACY TO IMPORT MARIJUANA ENDED BEFORE PETITIONERS, TALBERT, HERRING, BLACK, BURDINE, JACKSON, WHITE, JENKINS AND FORBES JOINED IT.

The indictment charged petitioners with a conspiracy only to import marijuana. That conspiracy ended on January 26, 1978, with the seizure of the Lady Ellen at sea and the arrest of her crew. The cooperation of the crew in the controlled delivery was "not in any sense a furtherance of

the criminal enterprise. It is rather a frustration of it." *Fiswick v. United States,* 329 U.S. 211, 217 (1946).

The decision below is in conflict with the *Fiswick* principle and in direct conflict with a First Circuit decision that applied the *Fiswick* principle in circumstances analogous to those present here. *United States v. Izzi,* 613 F.2d 1205 (1st Cir. 1980). In that case, the evidence established a conspiracy to import heroin among five persons. One of them agreed after he was arrested to work undercover for the DEA. In that role he arranged a $19,000 purchase of heroin by the original conspirators from one Izzi, who also agreed to make further sales to the conspiracy. The First Circuit reversed Izzi's conviction, holding that the conspiracy had terminated before Izzi got involved. *Id.* at 1209. The Court explained that the transaction with Izzi was not a continuance of the conspiracy to import heroin, but rather a government plan to obtain evidence in which the prime mover was not a conspirator but the DEA acting through the undercover agent. *Id.*

An additional conflict arises if the conspiracy to import marijuana did not end at sea, because it certainly ended when "Breslin, Harper and Rowe imported marijuana into the United States through the Beaufort Channel at approximately 9:00 on February 4, 1978." That is when the importation was complete.[9] A conspiracy ends with the success, failure or abandonment of its objective.[10]

[9] *Cunard S.S. Co. v. Mellon,* 262 U.S. 100, 122 (1923); *United States v. Morello,* 125 F.2d 631, 635 (2d Cir. 1957); *Palmero v. United States,* 112 F.2d 922, 924-925 (1st Cir. 1940); *Alksne v. United States,* 39 F.2d 62, 68 (1st Cir. 1930); *United States v. Lee Foo Yung,* 46 F.Supp. 147 (E.D. N.Y. 1942).

[10] *United States v. Kissel,* 217 U.S. 601, 608 (1910); *Brown v. United States,* 150 U.S. 93, 98 (1893); *Logan v. United States,* 144 U.S. 263, 309 (1892); see also, *Anderson v. United States,* 417 U.S. 215, 218

In *United States v. Alfrey*, 612 F.2d 180, 186 (5th Cir. 1980), the Fifth Circuit held that a person who boarded a vessel that had already entered the United States carrying marijuana could not be convicted of conspiracy to import the marijuana because the crime of importation of marijuana had already been committed. The decision below is in conflict with *Alfrey* because it upheld the convictions of these petitioners although no evidence showed any involved by them in the conspiracy until after the importation was completed. Petitioner Forbes boarded the vessel ten days after it had been seized at sea and shortly after it completed the importation. Petitioners Black and Burdine did not board the vessel until the early morning after the importation was completed. Petitioners Talbert, Herring, Jackson, White and Jenkins were not implicated until even later that morning.

VII.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE IMPORTANT QUESTION OF THE REQUISITE PROOF OF PARTICIPATION IN A CONSPIRACY.

It is axiomatic that "mere association with other persons involved in a criminal enterprise is insufficient to prove participation in a conspiracy." *United States v. Gutierrez*, 559 F.2d 1278, 1280 (5th Cir. 1977). "Mere association and activity with a conspirator does not meet the test . . . .

(1974); *Grunewald v. United States*, 353 U.S. 391, 397-402 (1957); *Lutwak v. United States*, 344 U.S. 604, 616-617 (1953); *Krulewitch v. United States*, 336 U.S. 440, 442-444 (1949); *Fiswick v. United States*, *supra* at 216-217; A.L.I. Model Penal Code §5.03(7)(a) (Official Draft 1962). Evidence of a defendant's membership in a conspiracy to possess or distribute contraband does not show guilt of a conspiracy to import the contraband. *Cf.*, *United States v. Cadena*, 585 F.2d 1252, 1256 (5th Cir. 1978); *United States v. Rodriguez*, 585 F.2d 1234, 1247 (5th Cir. 1978); see also, *Bollenbach v. United States*, 326 U.S. 607, 611 (1946).

Mere knowledge of the existence of a conspiracy is not sufficient to sustain a conviction." *United States v. Basurto,* 497 F.2d 781, 793 (9th Cir. 1974). The Government must prove both knowledge of the illegal purpose of the conspiracy charged and acts that are undertaken to further *that* purpose. *United States v. Falcone,* 311 U.S. 205, 210-211 (1940). Yet the most that the evidence showed against these petitioners was their presence an association with other persons in the vicinity of the importation. "Proximity to the crime or even actual presence at the scene of the crime is not sufficient." *United States v. Rodriguez,* 585 F.2d 1234, 1245 (5th Cir. 1978); see also, *United States v. Romano,* 383 U.S. 136, 141 (1965); *cf., County Court of Ulster Cty. v. Allen,* 442 U.S. 140, 158-159 n. 16 (1979). "[A] person's mere propinquity to others; independently suspected of criminal activity does not, without more, give rise" even to probable cause.. *Ybarra v. Illinois,* 100 S.Ct. 338, 342 (1979).

There is less evidence against these petitioners than against the defendants in several cases where federal courts have found the evidence insufficient to connect them with an alleged conspiracy.[11] In *United States v. Gutierrez,* 559 F.2d 1278 (5th Cir. 1977), Government officers watched a person who sold heroin to an undercover agent on three occasions meet with his uncle at the uncle's house on all three occasions before consummating the transaction by turning over the heroin. In addition, the officers found in the uncle's house $400 in marked bills that the undercover agents paid the nephew for heroin. The

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[11]See, *e.g., United States v. Burgos,* 579 F.2d 747, 749 (2d Cir. 1978); *United States v. Dyar,* 574 F.2d 1385, 1388-1389 (5th Cir. 1978); *United States v. Littrell,* 574 F.2d 828, 833-835 (5th Cir. 1978);*United States v. Caro,* 569 F.2d 411, 417-419 (5th Cir. 1978); *United States v. Stroupe,* 538 F.2d 1063, 1065-1066 (4th Cir. 1976); *United States v. Baker,* 499 F.2d 845, 847-849 (7th Cir. 1974).

Court held the evidence insufficient against the uncle. *Id.* at 1281.

In *United States v. Duckett,* 550 F.2d 1027 (5th Cir. 1977), three persons flew from the Bahamas to Miami with a red suitcase carrying heroin. Duckett was at the Bahamas airport at the same time as they; he asked them for a key; he had earlier been in the house of one of them when heroin was present; and he used the same alias as another of them. The Court held:

> "The joint presence of the defendant and the conspirators at the airport and the pre-existing relationship between the parties is insufficient alone to prove beyond a reasonable doubt that defendant had a part in the conspiracy. . . . Thus the fact that Duckett approached Gray and Gaston for a key and that Gaston possessed papers with both Duckett's true name and alias do not provide a legitimate basis for inferring his participation in a conspiracy to import heroin." *Id.* at 1030.

In *United States v. Valenzuela,* 596 F.2d 824 (9th Cir. 1979), the defendant was arrested in her own home – shared with her husband – where the officers also found heroin. When the officers came to the door to execute a warrant she attempted to push the door shut. The Court reversed her convictions for possession with intent to distribute and conspiracy. *Id.* at 830-831.

In *Ramirez v. United States,* 363 F.2d 33 (9th Cir. 1966), the defendant was present and knew what was going on when X bought marijuana in Mexico. Y also bought marijuana in Mexico but defendant was not present at that time. X and Y put their marijuana in Y's car and Y drove it across the border. The defendant and X

walked across the border. The defendant never touched the marijuana. The Court held the evidence insufficient to convict the defendant of aiding and abetting. *Id.* at 35; see also, *United States v. Peterson,* 416 F.2d 1216, 1220-1221 (9th Cir. 1969).

The decision below is in conflict with those decisions of the Fifth and Ninth Circuits. The principal evidence against Jackson, White and Jenkins was their presence in the house on Back Creek at 5:00 A.M., wearing heavy work clothes and long rubber boots. Jackson lived in the house; his presence in his own house can hardly evidence his involvement in criminal activity occurring in the vicinity. The presence of White and Jenkins as guests of Jackson is no more incriminating. The fact that the three were dressed for outdoor work at 5:00 A.M. is not a suspicious circumstance in a fishing community.

The house contained a CB transceiver and a scanning radio receiver. The evidence showed, however, that it was common for people in that area to have such equipment.

The conduct of Jackson, White and Jenkins was consistent with innocence. They had left the door unlocked, and invited the agents into the house when the agents requested permission to enter. Although the agents had been on the grounds for an hour before they came to the house, petitioners made no effort to flee or hide anything. They were cooperative with the agents, answering their questions and producing identification for them.

Talbert and Herring were stopped in automobiles proceeding in opposite directions on the highway about a mile from the dirt road leading to the raid site three hours after the raid. Both were driving vehicles rented in a fictitious name from the same agency, and White was arrested in the house at Back Creek carrying identification using that fictitious name. That evidence may establish an association

among these persons, but that association does not show the guilty involvement of any of them in the importation scheme. See *United States v. Duckett, supra* at 1030.[12]

In arguing the sufficiency of the evidence the Government relied on the Fifth Circuit's former "slight evidence" rule. Brief for the Government in the Court of Appeals at 83. That rule originated in *Tomplain v. United States,* 42 F.2d 202 (5th Cir.), cert. den., 282 U.S. 886 (1930), but was rarely used until recently. Comment, 64 Va. L.Rev. 881, 881 (1978). The Fifth Circuit overrruled it in *United States v. Malatesta,* 590 F.2d 1379 (5th Cir. 1979) (*en banc*): "The 'slight evidence' rule as used and applied on appeal in conspiracy cases should not have been allowed to worm its way into the jurisprudence of the Fifth Circuit. It is accordingly banished . . . ." *Id.* at 1382. The Fifth Circuit then held that "the correct standard of review is *substantial evidence,* it being understood, of course, that the evidence is to be viewed in the light most favorable to the government." *Id.* This Court has since reaffirmed that

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[12]The only other evidence relied on by the Government to build a case against Talbert or Herring was the notebook found in the house at Back Creek. The inadmissibility of this notebook is one of the conditional questions presented in this case. The notebook was not, in any event, probative against Talbert or Herring.

The name Talbert is not in the notebook. Talbert's first name, Gary, is not in the notebook either. His middle name, "Regan", is close in spelling to "Reagan", a name that enjoyed five scattered and innocuous references among the many pages and many names in the notebook. The Government made no effort to show that they related to the smuggling conspiracy, and presented no evidence regarding the identity of the person who wrote the name "Reagan", let alone that he knew Talbert or intended the name "Reagan" to refer to him.

There are several references to "Neil", also in innocent or ambiguous contexts, in the notebook. One conspirator was, of course, Neil Rowe. Herring's first name is Robert, not Neil. His middle name is McNeill, but there was no evidence that he was ever called by his middle name, let alone by the short form "Neil".

"the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 318 (1979); see also, *Glasser v. United States,* 315 U.S. 60, 80 (1942); see generally, *United States v. Alvarez,* ____ F.2d ____, ____ (5th Cir. 1980), 26 Cr.L.Rptr. 2465.

VIII.

THE DECISION BELOW RAISES IMPORTANT QUESTIONS UNDER THE JURY SELECTION AND SERVICE ACT OF 1968, 28 U.S.C. SECTIONS 1861-1871, REGARDING:

(A) WHETHER A LIST OF ACTUAL VOTERS MAY BE USED AS THE SOLE SOURCE OF NAMES FOR FEDERAL JURY SELECTION WHEN THAT PRACTICE RESULTS IN JURIES IN WHICH COGNIZABLE GROUPS ARE UNDER-REPRESENTED, AND

(B) WHAT STATISTICAL SHOWING CONSTITUTES A *PRIMA FACIE* CASE THAT FEDERAL JURY SELECTION PRACTICES RESULT IN JURIES IN WHICH COGNIZABLE GROUPS ARE UNDER-REPRESENTED.

The jury plan for the Eastern District of North Carolina provides that grand and petit juries shall be chosen only from lists of actual voters in the most recent presidential election. Those lists contain the names of only 38% of the population eligible for jury service because only that percentage voted in the 1976 election. As the Table in Appendix L shows, the District Court's reliance on that exclusive list resulted in the under-representation of black and low socio-economic status citizens on the grand and

petit juries in the District. The plan contains no provision for access to "some other source or sources in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862," which declare the right to juries selected at random from a fair cross section of the community and the right not to be excluded from jury service on account of race or economic status. 28 U.S.C. §1863(b)(2). See *United States v. Grant,* 475 F.2d 581, 581 (4th Cir. 1973) (Winter, J., dissenting from denial of rehearing). Accordingly, before trial petitioners challenged the composition of those juries on constitutional and statutory grounds and offered to prove the statistics shown in Appendix L. The District Court refused the offer of proof and denied the challenge.[13] Later, in *United States v. Coats,* 611 F.2d 37 (4th Cir. 1979), *cert. den.* April 21, 1980, No. 79-1230, the District Court allowed into evidence essentially the same data and denied a similar challenge. On appeal, the Fourth Circuit upheld that ruling, and in the present case the Fourth Circuit upheld the denial of the jury challenge on the basis of its decision in *Coats.* App. 14a n. 4.

The Fourth Circuit and the District Court have known at least since 1973 when *United States v. Grant, supra,* was decided that its exclusive use of lists of actual voters resulted in under-representation of blacks on juries. Yet they have taken no action to "prescribe other sources to supplement the voter lists," S. Rep. 891, 90th Cong., 1st Sess. 27 (1967), including what the Senate Report called "the preferred source, the registration lists". *Id.*

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[13]After the District Court denied the challenge, Petitioners waived jury trial. The District Court, however, expressly permitted Petitioner Herring to perserve his challenge to the composition of the petit as well as the grand juries in the District, and Herring waived jury trial in reliance on that procedure.

In its decisions in this and the *Coats* cases, the Fourth Circuit appeared to accept the proposition that supplementation of names by use of alternative lists would be required upon a "showing that voter lists do not represent a fair cross-section of the community." *United States v. Coats, supra* at 41, App. 16a. The Court did not discuss why it believed "that showing has not been made here," *id.*, App. 17a, and instead cited two cases that held that " 'neither the Act nor the Constitution require that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population' " *United States v. Test,* 550 F.2d 577, 586 n.8 (10th Cir. 1976) (*en banc*), *cert. den.,* 439 U.S. 1074 (1977); *United States v. Ross,* 468 F.2d 1213, 1216 (9th Cir. 1972), *cert. den.,* 410 U.S. 989 (1973).

Although the Fourth Circuit suggested that a demonstration of under-representation as well as systematic exclusion of a cognizable group would establish a violation of the statute, that reasoning suggests that it was requiring proof of intent to discriminate. Although discriminatory intent might be an appropriate standard in an Equal Protection analysis, *cf., Washington v. Davis,* 426 U.S. 229, 239 (1976), and a standard of systematic exclusion might be appropriate in a Sixth Amendment analysis, *Duren v. Missouri,* 439 U.S. 357, 366 (1979); *Taylor v. Louisiana,* 419 U.S. 522, 531 (1975), they have no place in consideration of whether the remedial *statute* has been violated. *Cf., City of Rome v. United States,* 48 U.S. Law Week 4463, 4468-4469 (1980); *Washington v. Davis, supra* at 238. Although voter lists are one convenient source for jury selection procedures, the end sought is not the use of voter lists but juries composed of a fair cross-section of the community. *Broadway*

v. Culpepper, 439 F.2d 1253, 1257 (5th Cir. 1971). "(E)xcluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial", *Taylor v. Louisiana, supra* at 530, if such exclusion results from the failure of such groups to vote in the same proportions as other groups any more than if it results from their failure to volunteer for jury service. *Id.* The command of the statute for supplementation from other lists has been ignored by the District Court. That default presents an important issue regarding federal judicial administration that needs to be decided by this Court.[14]

The statute prohibits jury exclusion on the basis of race or economic status. 28 U.S.C. §1863(b)(2); *see also, Thiel v. Southern Pacific Co.,* 328 U.S. 217, 223 (1946) (daily wage earners). The District Court jury selection system, however, resulted in under-representation of blacks, of persons in blue collar and service occupations and of persons with no college education. The table in Appendix L, using categories reported by the Bureau of the Census, shows that on a computation of "absolute disparity" blacks are under-represented on the grand jury by 10.2% and the petit jury by 11.7%, that blue-collar and service workers are under-represented on the two juries by 23.1% and 26.5% respectively, and that persons with no college are under-represented by 32.3% and 30.8% respectively.

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[14]Even voter registration lists may be so unrepresentative of the community as to require supplementation. Indeed, only 64% of the eligible population was even registered to vote in the District. Use of the registration lists would thus be an improvement over use of the voter lists, and the fact that they might not be a complete solution does not justify holding that the District Court need not strive to empanel more broadly representative juries, as the Fourth Circuit contended. *United States v. Coats, supra,* App. at 16a.

Using the computation of "comparative disparity"[15] the under-representation is even more stark: blacks on the grand jury by 33.8% and on the petit jury by 42.1%; blue-collar and service workers on the grand jury by 45.2% and on the petit jury by 52.4%; and persons with no college on the grand jury by 32.3% and on the petit jury by 30.8%.

In *Swain v. Alabama,* 380 U.S. 202 (1965), this Court held: "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as 10%." *Id.* at 208-209. Under the statute, however, purposeful discrimination need not be shown and this case presents an opportunity for the Court to determine the measures and standards for proof of a *prima facie* case of deviation from the cross-section ideal mandated by Congress. The Table in Appendix M shows some of the varying standards that the federal courts are employing, and illustrates the need for review by this Court.

Even if the absolute disparity measure is used, however, this case presents important questions about the tolerable standards of deviation in representativeness. The decision below upheld without discussion a deviation of 10.2% (grand jury) and 11.7% (petit jury) in a racial category. Such disparity is inconsistent with the statutory objective even if it is within or close to the constitutional limits. That racial deviation in this case is aggravated by the concurrent under-representation of socio-economic groups defined in terms of occupational categories and degree of

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[15]For an explanation of the "comparative disparity" measure and why it is more meaningful than "absolute disparity," see the Petition for Certiorari in *Masenky v. United States,* No. 79-1433, at 11-18. That petition also discusses as a third possible measure the "statistical significance" test.

education, by percentages in the range of 23.1% to 27.1%. The corollary of those figures is that professionals and managers are over-represented on the grand jury by 125.9% and on the petit jury by 180.9%, and that people with some college education are over-represented by over 160%. See Appendix L.

These statistics are certainly sufficient to shift the burden to the Government to show that it has a legitimate interest that is "manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group." *Duren v. Missouri, supra* at 367-368. If it cannot do so, there is no reason to tolerate such substantial deviations in the face of a statute commanding a high standard of representativeness and recommending supplementation of voter lists with other lists containing names of a broader spectrum of the community. The cure will not impose a hardship on the courts. Congress expressed a preference for voter registration lists. If needed, convenient supplemental sources are available. For example, the Law Enforcement Assistance Administration, finding that voter lists have a built-in-bias toward "white affluent white-collar citizens" and against the young, the black, the less educated, and the lower paid, is supporting projects to use lists of persons with drivers licenses. G. Munsterman, et al., *Multiple Lists for Juror Selection,* App. C, pages 2-3 (L.E.A.A. 1978).

The need for review by this Court is particularly acute because District Court jury selection plans are approved by the circuit judicial council in a non-adversary proceeding. 28 U.S.C. §1863(a). The judges who approved them in that context may not be able to appreciate their flaws, as this Court held was true of "state judges perhaps too close to the day-to-day operation of their system to be

able properly to evaluate claims that the system is defective." *Rose v. Mitchell,* 443 U.S. 545, 562 (1979).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court issue a writ of certiorari to review the judgment of the Fourth Circuit.

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No. 79-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DONALD WINSTON HARPER, NEIL WILSON ROWE, JAMES MERRILL BURDINE, JOHN WHITE, DAVID RAY JENKINS, DAVID RAYMOND GOVUS, DONALD ALFRED BLACK, GARY REGAN TALBERT, RICHARD LEWIS JACKSON, MICHAEL BENJAMIN FORBES and ROBERT McNEILL HERRING,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 22.6, petitioners submit this Supplemental Brief to call the Court's attention to two new cases that are relevant to the first question presented by the Petition for a Writ of Certiorari: Whether the stopping, boarding and searching without probable cause or even reasonable suspicion and without a warrant of an American fishing vessel on the high seas 800 miles off the coast of the United States by a Coast Guard cutter whose primary mission was marijuana law enforcement can be justified under the Fourth Amendment as a border search, an administrative search, or a "necessary" search.

The cases are *United States v. Hilton*, 619 F.2d 127 (1st Cir. 1980) and *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc). Both were decided shortly before the petition for a writ of certiorari was filed but petitioners were unaware of them at that time and the Government did not mention them in its Brief in Opposition. No further review has been sought in *Williams* but *Hilton* is pending before this Court on a petition for certiorari in No. 79-1732.

Although neither *Hilton* nor *Williams* raised the precise issue presented in this case, both involved Coast Guard searches of vessels on the high seas; and both cases demonstrate the increasing frequency with which the issue of the constitutionality of such searches is being litigated, the difficulties that the lower courts are having in grappling with that issue in the various factual contexts in which it arises, and the conflicts that are continuing to develop in the circuits regarding the proper doctrine to resolve the issue. Thus, they further illustrate the national importance of the issue and the critical need for this Court to address it.

Williams involved a foreign vessel which the Coast Guard had probable cause to believe was importing marijuana from Colombia to the United States. The Coast Guard apparently acquired its probable cause from the effective deployment of Operation Stopgap, the same mission for which the Coast Guard Cutter Alert was deployed in the present case. In January, 1978 – the operational period for Operation Stopgap – a DEA pilot observed the vessel, which was of Panamanian registry, off the coast of Colombia being loaded with marijuana. Five days later the Coast Guard observed the vessel in the Yucatan Passage, one of the Caribbean passages in addition to the Mona Passage that the Coast Guard was covering pursuant to Operation Stopgap. She hoisted a distress flag

and advised that she was en eroute to Alabama. Later, crew members began waving clothes, toilet paper and flashlights and giving hand signals, and one crew member dove overboard and told the Coast Guard that there was "dirty business" on the vessel. In addition, Panama authorized the Coast Guard to stop, board and search the vessel.

Thus, the ensuing search was clearly constitutional and all of the Judges of the Fifth Circuit agreed that it was. The Court, however, convened en banc, it explained, "to harmonize the discordant precedent that has evolved in the Fifth Circuit. . . ." 617 F.2d at 1069. The Fifth Circuit had once before sat en banc to adjudicate the constitutionality of a search at sea. *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc). In *Williams*, the Court acknowledged "the muddled state of our precedent." 617 F.2d 1071; see also, *id.* at 1072, 1093. The Court then divided four ways about the proper doctrine to apply to the case.

The plurality of twelve Judges held that the Fourth Amendment permits the Coast Guard to stop and board a foreign vessel on the high seas at least when there is a reasonable suspicion that the vessel is subject to American jurisdiction because it is violating American law. The plurality also reiterated the Fifth Circuit law, discussed in the petition, permitting the Coast Guard to stop American vessels on the high seas "for routine safety and documentary checks." 617 F.2d at 1082. It said: "These cases reconfirm the notion that the Fourth Amendment does not necessarily require any sort of suspicion of criminal activity before a vessel may be stopped at sea." *Id.* It is unclear whether the plurality intended to limit that statement to "routine safety and documentary checks," but that is as far as that Court's precedent would support it.

Four Judges, in an opinion by Judge Rubin, pointed out that resolution of the issue was unnecessary to the decision of the case because the Coast Guard had probable cause and exigent circumstances for its action. Nevertheless, because the plurality had discussed the issue, these Judges stated their position that unless the stopping of a vessel, foreign or domestic, can be justified as a legitimate border search or administrative stop for a document and safety inspection, it may not be searched on the high seas "without probable cause and exigent circumstances." *Id.* at 1098-1099.

Six Judges, in an opinion by Judge Roney, stated their view that the Fourth Amendment does not apply to a *foreign* vessel on the high seas. *Id.* at 1091. Judge Anderson wrote that because there was probable cause and the circumstances were exigent he would not reach the issue of what standard was required.

The *Hilton* case also presented a different factual situation than the present case. *Hilton* involved a routine document and safety inspection of a vessel sailing under suspicious circumstances in the Gulf of Maine by a Coast Guard cutter on regular patrol, without any special narcotics assignment. In apparent consistency with the Fifth Circuit but in apparent conflict with the Fourth Circuit in this case, the First Circuit held that 14 U.S.C. section 89(a) "has been consistently construed as limiting such stops [by the Coast Guard of American vessels on the high seas] – in the absence of probable cause – to the necessary task of conducting safety and document inspections. [Citations omitted.] A more extensive search is permissible only if there is consent or probable cause to believe a crime has been or is being committed." 619 F.2d at 131.

The Court of Appeals held "that the stop and boarding was lawful, absent any particularized suspicion of criminal

activity aboard, because it was undertaken as a systematic 'border' stop and inquiry," App. 4a-5a, "albeit 800 miles at sea." App. 7a. It augmented that primary holding with a discussion of principles appropriate to an administrative search and an asserted governmental necessity for the search outside of all constraints imposed by the Fourth Amendment. The Government, in its brief, did not, however, even refer to the border search or "necessary" search rationales. Thus, it ignored entirely the extreme and unjustified application of border search doctrine that was the principal basis for the decision in the Court of Appeals and that will continue to have precedential impact unless overturned by this Court. Instead, the Government tried to support the search as a safety and documentation inspection of all American flag vessels under 250 feet in length that sailed through the Mona Passage. Brief for the United States in Oppositon at 5, 6-7. That position is inconsistent with the Court of Appeals' conclusion that this was a border search. It is also inconsistent with the Government's position in the Court of Appeals, where it never asserted that the Coast Guard action was a safety and documentation inspection. Instead, it stipulated: "The evidence in this case shows that the Alert was on a general law enforcement patrol with a special emphasis on drug interdiction. The crucial inquiry therefore is whether, given this purpose, it was reasonable to stop and board the vessel, and conduct inquiries thereon, without some reasonable ground for suspicion of illegal activity." Brief for Appellee at 34-35, 24. Indeed, the Assistant United States Attorney who represented the Government in the District Court and the Court of Appeals wrote counsel for petitioners on January 10, 1979, in connection with settling the contents of the Appendix in the Court of Appeals: "I do not anticipate that there will be any significant diferences on appeal concerning the reason for the Alert

being in the Mona Passage at the time it stopped and boarded the Lady Ellen. The Government stated before the District Court that the [Alert] was in the Mona Passage as a part of the Coast Guard's cooperation with the Drug Enforcement Administration's Operation Stopgap. The Alert was in the Mona Passage primarily for drug interdiction. In fact, the District Court specifically found this to be the situation." The evidence supports that position. As the Coast Guard cutter in *Williams* was stationed in the Yucatan Pasasge pursuant to Operation Stopgap waiting for information giving it probable cause to stop vessels sailing to the United States with marijuana, the Alert was stationed in the Mona Passage pursuant to Operation Stopgap. Its captain decided to stop all American vessels less than 250 feet in length "simply because of the amount of traffic, there was not a great deal of traffic, and we were just boarding every vessel that we could." A. 336-337, 445-446. Lieutenant Commander White testified: "I think . . . we didn't really . . . nobody told us, gave us direct orders to do that." A. 336. There was no evidence that the purpose of doing so was anything other than carrying out what the District Court found was "[t]he principal purpose of the Alert's mission. . . drug law enforcement," A. 104, as part of a major coordinated effort among five federal law enforcement agencies. There was no testimony and no document stating that the purpose was a safety and documentation inspection. The Alert's logs and its Commanding Officer's Night Order Book consistently recited that it was "underway in the Mona Passage pursuant to Operation Stopgap." A. 903-948. Lieutenant Commander White testified "that our primary reason down there was . . . at that particular time, was to prevent smuggling, the trafficking of drugs, yes." A. 269. Even the mess cook knew that the Alert's mission was "[t]o stop the flow of drugs through the three passages" by stopping and boarding vessels pursuant to Operation Stopgap. A. 415-417.

Furthermore, petitioners are prepared to argue, if necessary, that the safety and documentation rationale cannot justify the stopping and boarding of an American vessel on the high seas without any constraints or standards whatsoever, see Petition for Certiorari at 18-19, which is the doctrine urged by the Government. The applicable regulation, 19 C.F.R. section 162.3(a)(1977), requires "probable cause to believe that such vessel is violating or has violated the laws of the United States" before a Coast Guard officer may go on board an American vessel on the high seas "for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel."

Although the Government in its Brief in Opposition, at pages 5-6, contends that only petitioners Harper and Rowe – who were the crew members on the Lady Ellen – may assert the Fourth Amendment claim, the Court of Appeals found that petitioner Govus also had "standing". App. 4a. It held that Govus had the "right of possession and control of the vessel." A. 4a, n.1. Govus filed an affidavit attesting that he had a proprietary interest in the Lady Ellen and her cargo. DEA Agent Johannesen testified that Govus was known to own an interest in the vessel. Govus gave the crew their instructions for the trip and the money for the marijuana. He met the vessel in Colombia and supervised the loading of the marijuana. He again met the Lady Ellen when she arrived in Back Creek.

Accordingly, the question of the search at sea is raised by at least one person who was the owner and in control of the vessel, who organized the venture and who exercised continuing supervision over her voyage, and two persons who were crew members present on the vessel at the time of the search. The question was decided on the merits by the District Court and again by the Court of Appeals,

after full briefing and argument. It is an important one that has been the subject of conflicting and concededly "muddled" decisions in the circuits. It is recurring with increasing frequency in the federal courts.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1863

DONALD WINSTON HARPER, NEIL WILSON ROWE, JAMES MERRILL BURDINE, JOHN WHITE, DAVID RAY JENKINS, DAVID RAYMOND GOVUS, DONALD ALFRED BLACK, GARY REGAN TALBERT, RICHARD LEWIS JACKSON, MICHAEL BENJAMIN FORBES and ROBERT McNEILL HERRING,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5016

United States of America,

Appellee,

v.

Donald Winston Harper,
John White, a/k/a Leroy J.
Edwards, a/k/a Roy Edwards,
Neil Wilson Rowe,

Appellants.

No. 79-5017

United States of America,

Appellee,

v.

James Merrill Burdine,

Appellant.

No. 79-5018

United States of America,

Appellee,

v.

David Ray Jenkins and
David Ramond Govus, a/k/a
Sam, a/k/a Melvin Hawkins,

Appellants.

No. 79-5019

United States of America,

Appellee

v.

Donald Alfred Black,
Gary Regan Talbert and
Robert McNeill Herring,

Appellants.

No. 79-5020

United States of America,

Appellee,

v.

Richard Lewis Jackson and
Michael Benjamin Forbes,

Appellants.

Appeals from the United States District Court for the Eastern District of North Carolina, at New Bern.
F.T. Dupree, Jr., District Judge.

Argued: August 22, 1979 Decided: February 13, 1980

Before BUTZNER, HALL and PHILLIPS, Circuit Judges.

Barry Nakell for Appellants in 79-5016 through 79-5020; Reber Boult for Appellant Herring; (Steven A. Bernholz on brief) for Appellants Black and Talbert; (Robert

Fierer on brief) for Appellant Burdine; (James K. Jenkins on brief) for Appellants Harper and Rowe; (Norman B. Kellam and David P. Voerman on brief) for Appellants Jackson and Forbes; (Edwin Marger on brief) for Appellant Govus; (Bruce H. Morris on brief) for Appellant White; (John W. Stokes on brief) for Appellant Jenkins; Herman E. Gaskins, Jr., Special Assistant United States Attorney (George M. Anderson, United States Attorney on brief) for Appellee United States of America in 79-5016 through 79-5020.

HALL, Circuit Judge:

Appellants appeal their conviction for conspiracy to import marihuana in violation of 21 U.S.C. §§925(a), 960(a)(1) and 963. Each appellant was arrested at or near the scene of a Drug Enforcement Administration raid in an isolated area of North Carolina where 25 tons, some 400 bales, of South American marihuana were being unloaded from a shrimping trawler. The vessel had been intercepted on the high seas, where its captain and crew agreed to assist in the successful raid at the delivery site. Primarily, appellants raise fourth amendment issues arising out of the interception of the vessel on the high seas, and two vehicular stops of defendants driving along a state highway one mile from the dirt access road to the site. Finding no error in these and the other issues raised, we affirm.

I.

The facts leading up to this raid are discussed in part in *United States v. Coats,* ____ F.2d. ____, No. 79-5015 (4th Cir. Nov. 29, 1979). Those involving the discovery and boarding of the shrimping vessel, the LADY ELLEN, are there stated succintly as follows:

> [I]n January of 1978 the United States Coast Guard was engaged in patrolling the Carribean sea lanes for general law enforcement purposes with a special emphasis on drug interdiction. On January 25th the Coast Guard Cutter ALERT spotted the LADY ELLEN, a fishing vessel of North Carolina registry, in the Mona Passage between the Dominican Republic and Puerto Rico. Following its policy of stopping all United States vessels less than two hundred fifty (250) feet in length, the crew of the ALERT stopped and boarded the LADY ELLEN and inquired of its master the vessel's destination and point of embarkation. At that point the master stated "you got me, I'm coming from Columbia and I have a load of marijuana on board." A search ensued which produced some twenty-five (25) tons of marijuana.
>
> . . .
>
> The Coast Guard admittedly had no suspicion concerning criminal activities aboard the vessel.

Id. at ____.

The propriety of that stop was never decided because we upheld the district court's ruling that appellant Coats had no standing to raise fourth amendment objections to it. Some of the appellants here have such standing,[1] and we hold that the stop and boarding was lawful, ab-

---

[1] In *Coats,* we indicated that the right of possession and control of the vessel was in "Sam." *Coats, supra,* slip op. at 7. The man referred to as "Sam" is appellant Govus.

sent any particularized suspicion of criminal activity aboard, because it was undertaken as a systematic "border" stop and inquiry.

Stops and searches at established border checkpoints are reasonable *per se*, so that the fourth amendment's protection against *unreasonable* searches and seizures is not implicated.[2] The controlling standards are those of the statute granting authority to the government officials to conduct the search. *United States v. Bilir*, ____ F.2d ____ (4th Cir. 1979) *citing United States v. Ramsey*, 431 U.S. 606, 616-19 (1977).

---

[2]In *United States v. Bilir*, ____ F.2d ____, we explained the rationale of allowing custom checks at places other than the territorial border.

> While the justification for the relaxed [fourth amendment] standards is at its clearest with respect to searches at regular customs stations literally "on the border," it has long been recognized to apply as well to so-called "extended border searches," under which "border" is given a geographically flexible reading within limits of reason related to the underlying constitutional concerns to protect against unreasonable searchs. *See e.g., Castillo-Garcia v. United States*, 424 F.2d 482 (9th Cir. 1970). The many difficulties that attend the attempt to intercept contraband and to apprehend increasingly mobile and sophisticated smugglers at the very borders of the country have of course given birth to the doctrine. It holds that some searches by customs officials, though conducted at points physically away from an actual border and removed in time from the precise time of importation, may nevertheless be treated as border searches. *Id.* (citing cases). The test of validity is one of reasonableness under the circumstances.

____ F.2d at ____. (footnote omitted).

The Coast Guard's statutory authority and traditional role of policing vessels on the high seas is found in 14 U.S.C. §89(a), and its historical antecedents. *See Maul v. United States,* 274 U.S. 501, 512-531 (1927) (concurring opinion of Mr. Justice Brandeis).

14 U.S.C. §89(a)[3] reads in pertinent part,

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

By its terms, the Coast Guard's authority to stop and board vessels on the high seas is plenary. *United States v. Warren,* 578 F.2d 1058, 1064 (5th Cir. 1978) (*en*

---

[3]This statute can be distinguished from one involving the authority of a customs officer to stop vessels and to broadly search "any person, trunk, package or cargo" for the purpose of collecting custom duties and enforcing revenue laws. 19 U.S.C. §1581. *United States v. Warren,* 578 F.2d 1058, 1064-65, n. 4 (5th Cir. 1978). *See* 19 C.F.R. §162.3(a)(2) (requiring probable cause for customs officers to board and search a vessel on the high seas). *See also* 19 U.S.C. §482, cited in *United States v. Bilir,* ____ F.2d ____ (4th Cir. 1979).

banc)., In *Warren,* the Fifth Circuit held, in an *en banc* decision, that §89(a) authorizes discretionary boardings of American flag ships on the high seas, with no particularized suspicion about criminal activities aboard, in order to allow officers to conduct random safety and documentary inspections and, "to look for obvious customs and narcotics violations." *Id.* at 1065. See, *United States v. Cadena,* 585 F.2d 1252, 1262-63 (5th Cir. 1978).

We think the Coast Guard's exercise of its boarding authority in this case did not violate the fourth amendment.

First, the stop and boarding was not one made at the will and whim of the officer in the field. *Delaware v. Prowse,* 99 S.Ct. 1391, 1401 (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543, 566-67 (1976). It was undertaken pursuant to a policy adopted through the cooperation of several government agencies to stop all vessels sailing under the American flag which were equipped and of a size sufficient for large-scale smuggling operations which could not be easily detected along isolated areas of the United States coast. It was conducted at a checkpoint in waters well known as sea lanes for such clandestine operations. All vessels of that kind which passed the checkpoint were boarded. These boardings could have been made routinely at port without a particularized suspicion that contraband was being imported and we see no reason why systematic boardings on the high seas should be held unreasonable because they are made away from the border and port, albeit 800 miles at sea.

Second, the nondiscretionary stop and boarding of all vessels passing the checkpoint posed a minimal and, under the cirumstances, a reasonably necessary intrusion

on privacy interests. The vessel was a commercial vessel sailing on the high seas. Administrative and regulatory searches of commercial enterprises, and vessels generally, intrude on interests and expectations of privacy very different from those involving the integrity of persons and residences not subject to ongoing regulation. Relaxed fourth amendment standards have been approved for closely regulated industries historically subject to close supervision and inspection. *See Almeida-Sanchez v. United States,* 413 U.S. 266, 270-72 (1973). Certain industries such as liquor and firearms have such a history of government oversight that no reasonable expectation of privacy exists within the industry.

Commercial shipping can be categorized another such enterprise. Since the beginning of the republic, federal officials have had the authority to board and inspect American flag ships. Persons who sail under the American flag accept the responsibilities and the burdens when they elect to register their ships with the United States Coast Guard. Such regulatory inspections have their basis in the international law of the seas that requires each nation carefully to maintain the navigability and safety of its own commercial fleet as a condition of non-interference from other nations. *See United States v. Warren,* 578 F.2d at 1064-65. (Stop and boarding on high seas.) *But see, United States v. Piner,* 608 F.2d 358 (9th Cir. 1979) (Stop and boarding on San Francisco Bay.)

Further we think special considerations apply to the stop and boarding of a vessel on the high seas. The antecedent sailing of the vessel away from United States territorial waters, the probability of return to the United States by the vessel, the historical regulation of vessels on the high seas (and the consequent lowered expecta-

tion of privacy which prevails with respect to activities in that setting), as well as the practical difficulties of policing United States vessels on the high seas if some standard of prior suspicion is required, are factors which coalesce to make the search on the high seas a special case, in much the same sense that a border search is.

As contrasted to the citizen living on land and subject to the jurisdiction of numerous police departments and overlapping controls of several layers of government requiring the highest degree of procedural rights, a ship is easily lost upon the vast ocean and subject only to the control of the infrequent government vessels of her own country. Unlike the land-bound citizen who is in constant contact with government and police, the mobility and anonymity of the boat require that the government be able to exercise effective control when the opportunity presents itself. To require some particularized suspicion concerning individual vessels in order to carry out a systematic inspection of all vessels in some area of the sea would encourage outright flaunting of the navigation, safety and administrative laws of the United States at the expense of our government's sovereign obligation under international law to police its flag ships.

Finally, in all, we think the checkpoint stop and boarding of each vessel of a particular kind in a well-traveled sea lane on the high seas is not unlike roadside truck weigh-stations and inspection points which the Supreme Court has expressly approved as reasonable, nondiscretionary intrusions on privacy interests beyond the warrant and probable cause requirements of the fourth amendment. *Delaware v. Prowse,* 99 S.Ct. 1391, 1401, n.26 (1979).

We now turn to the reasonableness of the stops of vehicles passing in the vicinity of the drug raid.

II.

When the vessel was ready to enter American waters, the crew was put in charge and continuous surveillance was maintained by aircraft of the Drug Enforcement Administration, United States Customs and the North Carolina State Bureau of Investigation.

The LADY ELLEN sailed to Morehead City where a man came on board to take over her navigation to the landing site. A flotilla of Customs patrol boats followed her from Morehead City toward a sparsely populated area along Back Creek several miles from Merriman. As they followed, officers in the patrol boats observed a light-colored 1970 or 1972 model Plymouth or Dodge on the bank at a bridge. The headlights of the automobile were turned on the boats as they passed. During the unloading operations, the master of the LADY ELLEN overheard radio warnings from an apparent lookout that small boats were speeding toward the site.

When alerted about the approaching boats, the supervisor of the operation ordered the master to sail the LADY ELLEN away from the dock northward to a getaway car but the vessel was intercepted by a patrol boat waiting upstream.

The aircraft pilots observed small boats sailing away from the LADY ELLEN and directed land units toward the place where those boats had docked. The agents closed in on a clearing where they observed a frame house, a newly-constructed fish house and a newly-constructed dock on the water. They observed large trucks lined with black plastic and pickup trucks with

campers and loading devices. Also, they saw a boat docked near the fish house which was stacked with bales of marihuana.

After the landing area was secured, a federal agent left to look for suspects who might be fleeing or helping others to flee via the only paved road with access to the site. He used an unmarked car and was accompanied by a state officer.

Just before dawn, at 5:45 a.m., the officer stationed the car three miles from the raid site, some seven-tenths of a mile from the dirt road leading into the site. The paved road ends, with no outlet, a few miles further in Merriman. The federal agent had some knowledge of the apparent lookout at the bridge, and, from the size and nature of the smuggling operation, he expected lookouts and other suspects would likely be in the general area seeking to escape.

The agent's checkpoint was not a road block; he concealed the car in the woods with a flasher light on the dashboard.

In the first hour, one car passed. It was stopped and the driver, a nurse going to work, was allowed to continue on her way.

The second car, arriving at 7:05 a.m., in the dawning light hours, was stopped. It was going in the direction of the raid site. It was a cream-colored 1972 Dodge. The officers were not in uniform and identified themselves, respectively, as federal and state law enforcement officers. The driver, appellant Talbert, was asked for his driver's license and car registration. He rendered a Georgia license and a car rental agreement showing the car was rented to a third party. He told the officers he

was in the area for "hang gliding" sport. The state officer arrested him for an alcohol charge. Eventually, Talbert was implicated, charged and convicted in this criminal action.

As this questioning was being conducted, other police cars came to join the officers. Their cars created a visible checkpoint area as a third car approached the scene, driven by appellant Herring. The car was a grey, early 1970's model Plymouth. When he drove up to the police cars, he was asked for a license and car registration. He produced a Georgia driver's license and a rental agreement from the same car agency as Talbert's, showing his car was rented in the name of the same third party. When asked what he was doing in the area, he replied he was there to go "hang gliding." He volunteered to go to Morehead City for photographing and fingerprinting. Later he was implicated, charged and convicted.

Appellants Talbert and Herring argue that these stops were as intrusive and unreasonable to passing motorists as was the surprise discretionary stop in *Delaware v. Prowse,* 99 S.Ct. 1391 (1979), which the Supreme Court held to be unreasonable. They argue that here individual agents – with no supervisory approval, using unmarked cars and attired in plain clothes – stopped passing motorists for questioning with no particularized suspicion about their participation in illegal activity. Also, at least for the stop of the first appellant's car, it is emphasized that the concealment of their car and the surprise stop could not be fairly called a "checkpoint" stop since no prominent signs or evidence of official activity was visible to law-abiding motorists. *See United States v. Martinez-Fuerte,* 428 U.S. 543, 545-46 (1976).

We think this analysis misses the mark. In *Prowse,* the Supreme Court was concerned with random stops of

vehicles made at the will and whim of officers in the field, where the officers have no reason to stop any particular vehicle, other than for general police surveillance.

Here, the problem is very different. The purpose of these stops was to arrest suspects for a known crime, not to discover evidence of undetected crimes by the happenstance of visual searches. A serious crime had been committed involving numerous participants, some of whom were known to be fleeing the scene along a route reasonably expected to be used for their escape. Stopping all cars there was, under such circumstances, a necessary means of law enforcement, and as such, justifies the minimal intrusion on privacy rights posed to passing motorists.

The Fourth Amendment does not create barriers to reasonable law enforcement activities in the area of a detected crime.

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, [*Terry v. Ohio,* 392 U.S. 1 (1968)] recognizes that it may be the essence of good police work to adopt an intermediate response.

Adams v. Williams, 407 U.S. 143, 146 (1972). By virtue of the exigency of fleeing, perhaps dangerous, suspects, we think the stops of all persons found on a likely access route to the scene of the crime was reasonable, both in its purpose and in the manner it was conducted. *See United States v. Constantine,* 567 F.2d 266 (4th Cir. 1977) *cert. denied* 434 U.S. 872 (1978); *United States v. Jackson,* 448 F.2d 963 (9th Cir. 1971).

III.

In conclusion, we think the evidence obtained as a result of the vessel and vehicular stops in question was admissible against the appellants. We acknowledge the numerous issues raised by various appellants but find no reversible error in any of them.[4] Accordingly, the judgments of conviction are each affirmed.

AFFIRMED.

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[4]In *United States v. Coats*, 611 F.2d 37 (4th Cir. 1979) we decided the issue of jury selection and are here bound by it. We note that appellant Herring has filed a supplemental brief objecting to that opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5015

United States of America,

Appellee,

-versus-

Gilliam Raymond Coats
a/k/a Jack Long,
a/k/a Bill Waters,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern.
F.T. Dupree, Jr., District Judge.

Argued: July 12, 1979. Decided: November 29, 1979

Before RUSSELL, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

Bobby Lee Cook (Cook & Palmour on brief) and L. Patten Mason (Mason and Phillips, P.A. on brief) for Appellant; Herman E. Gaskins, Jr., Special Assistant United States Attorney (George M. Anderson, United States Attorney on brief) for Appellee.

RUSSELL, Circuit Judge:

. . . .

The defendant also challenges the jury selection plan for the eastern district of North Carolina as failing to comply with the National Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1875, and as violating the Fifth and Sixth Amendments. The particular plan at issue here utilizes lists of actual voters for jury selection. The defendant contends that use of this list resulted in an exclusion of 60% of the eligible jury population in the district, and that an alternative source of names should have been used.

The only showing here is that persons who failed to vote in the 1976 general election were excluded from consideration for jury duty. Absent a demonstration that some cognizable group has thereby been systematically excluded or substantially under-represented, this type of exclusion does not violate constitutional principles.[6] Nor does it fail, as defendant suggests, to comply with the policies and directives of the Act. As defendant's own figures demonstrate, use of voter registration lists rather than actual voter lists would increase the source from 40% of those eligible to 64%, thus still excluding 36%. Yet both types of lists are expressly approved by the Act. 28 U.S.C. §§ 1863(b)(2). Nor is any supplementation of names by use of alternative lists required absent a showing that voter lists do not represent a fair cross-section of the community.[7] With no demonstration of under-representation or systematic ex-

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[6] *Castaneda v. Partida* (1977) 430 U.S. 482, 493-94; *Brown v. Allen* (1953) 344 U.S. 443, 470-74 (opinion of Mr. Justice Reed, announcing judgment).

[7] *United States v. Test* (10th Cir. 1976) 550 F.2d 577, 584, 586 n. 8 (en banc); *United States v. Brady*, (9th Cir. 1978) 579 F.2d 1121, 1131, *cert. denied*, ____ U.S. ____, 99 S. Ct. 849; *United States v. Ross* (9th Cir. 1972) 468 F.2d 1213, 1216, *cert. denied*, 410 U.S. 989 (1973).

clusion of any cognizable group, that showing has not been made here.

We have given careful consideration to defendant's other grounds of appeal and find no errors therein. Accordingly, the judgment of conviction is

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA NEW BERN DIVISION

[Filed June 16, 1976
John R. Whitty, Clerk
U.S. District Court
E. Dist. No. Car.]

UNITED STATES OF AMERICA)	MEMORANDUM AND REC-
)	OMMENDATION ON MO-
)	TIONS TO SUPPRESS EVI-
v.)	DENCE RELATING TO THE
)	VESSEL LADY ELLEN
DONALD WINSTON HARPER)	No. 78-08-01-CR-4
MICHAEL BENJAMIN FORBES)	No. 78-08-02-CR-4
JOHN WHITE,)	No. 78-08-03-CR-4
a/k/a Leroy J. Edwards,)	
a/k/a Roy Edwards)	
DONALD ALFRED BLACK)	No. 78-08-04-CR-4
HERBERT FRANKLIN CLARK)	No. 78-08-05-CR-4
DAVID RAY JENKINS)	No. 78-08-06-CR-4
JAMES MERRILL BURDINE)	No. 78-08-07-CR-4
RICHARD LEWIS JACKSON)	No. 78-08-08-CR-4
DAVID RAYMOND GOVUS,)	No. 78-08-09-CR-4
a/k/a Sam,)	
a/k/a Melvin Hawkins)	
PAUL JEROME BRESLIN)	No. 78-08-10-CR-4
PETER FORBES)	No. 78-08-11-CR-4
ROBERT McNEILL HERRING)	No. 78-08-12-CR-4
NEIL WILSON ROWE)	No. 78-08-13-CR-4
GARY REGAN TALBERT)	No. 78-08-14-CR-4
)	

All defendants have filed motions to suppress all evidence obtained by the government in the search and seizure of the vessel Lady Ellen. The United States Coast Guard stopped the Lady Ellen between Puerto

Rico and the Dominican Republic on January 26, 1978, boarded her, searched the ship, found large quantities of marihuana on board, and arrested the master and the two crewmen. Those three and the other eleven defendants were then indicted on charges of conspiracy to import marihuana and the importation of marihuana in violation of Title 21 U.S.C. §§ 952(a) and 960(a)(1).

The Coast Guard Cutter Alert in January, 1978 was patrolling Mona Passage, which runs between Puerto Rico and the Dominican Republic, for the purpose of enforcing all United States laws, more particularly those relating to safety, documentation, fisheries, illegal aliens, and illegal drugs. The principal purpose of the Alert's mission was drug law enforcement. The general continuing orders governing the operations of Coast Guard vessels including the Alert at the time in question were contained in Coast Guard Operation Manual 201-78, denoting the fiscal year 1978. It was commonly referred to in the testimony as Operation Manual 201-Yr. The Coast Guard cooperated with the Customs Service and the Drug Enforcement Administration in carrying out law enforcement at sea. One cooperative effort was referred to as Operation Stopgap, a Drug Enforcement Administration intelligence gathering operation whose purpose was to obtain maximum information possible concerning illegal drug activities. An intelligence clearing house facility at El Paso, Texas, referred to as El Paso Intelligence Center (EPIC), received intelligence information concerning illegal activities and transmitted them to appropriate agencies. In turn, the Coast Guard and the Customs Service reported sightings, boardings, seizures and other law enforcement activities to EPIC. I find that the Coast Guard was not governed in its operations during the period in question by what is known as Operation Stopgap; it utilized the information

received from EPIC and transmitted to EPIC pertinent information obtained in its law enforcement activities. Prior to the sighting and boarding of the Lady Ellen, none of the government agencies had received any information suggesting that the Lady Ellen was involved in the importation of marihuana or in other illegal activities.

The sequence of events regarding the seizure of the Lady Ellen was as follows. The Alert was on patrol in Mona Passage on the evening of January 26, 1978. At approximately 7:45 p.m. a lookout on the Alert sighted a white light which did not correlate with any radar contact. Orders went to the helicopter operating from the Alert to proceed in the direction of the light to investigate. Within a few minutes of the sighting of the light, the Alert's navigation department using normal radar equipment established contact with a ship carrying the light and established its position as being six and one-half miles off the coast of the Dominican Republic. The helicopter approached the vessel and hovered astern of it in order to read on the hull the name of the vessel and home port, using an extremely high intensity search light known as a "night sun" for that purpose. The helicopter reported by radio telephone to the Alert that it was the Lady Ellen out of Wanchese, North Carolina.

Since general orders under which the Alert was operating included an order to stop and board every U.S. vessel under 250 feet in length proceeding through Mona Passage, the commanding officer of the Alert made a decision to board the Lady Ellen and radioed a message to the master of the Lady Ellen directing him to heave to, and that the Alert was going to send a boarding party to board the vessel. The Alert launched a boarding party, which proceeded to the Lady Ellen and

boarded. The officer in charge identified himself and his boarding party to the master of the vessel, defendant Paul Breslin. The boarding officer asked the master, "Where are you coming from and going?" Breslin immediately answered, "You've got me. We are coming from Columbia and are loaded with marihuana." Lieutenant Commander White, the senior officer in the boarding party, immediately ordered that all persons on board be mustered at the fantail. The boarding officer, Ensign Olthuis, seeing the master and one other person in view (defendant Donald Harper), inquired whether any other persons were on board, and defendant Neil Rowe was brought out to join the others. Olthuis then inquired whether any weapons were on board and was told that there were not. At that point Ensign Olthuis gave the crew their *Miranda* warnings, and then he left to search the ship.

The executive officer of the Alert (Lieutenant Commander White) then questioned the crew, and the matter of their willingness to participate in a controlled delivery of the marihuana ashore was discussed. At that time one of the defendant crewmen, probably Breslin, stated that their intended destination for unloading the marihuana was the United States. Defense counsel in cross-examining Mr. White pressed him to say whether the announcement of the U.S. destination followed or preceded the search for and discovery of the marihuana. At first White said he did not think that it was after the search, and a few moments later said that it was learned after the search. That point however is not material to a decision on the issue of the validity of the seizure. The boarding party immediately learned of the presence of the marihuana on board from the master's spontaneous disclosure. White and Olthuis both mentioned the strong odor on board, unquestionably the marihuana, although

in their testimony they did not specifically identify it as the distinctive marihuana odor. Once the master declared that the marihuana was on board, no legal significance attached to the matter of whether the officers learned of the destination before or after the search. Probable cause to search the ship existed when the master announced that the vessel was loaded with marihuana. Obviously the destination would be the first question to discuss with regard to a controlled delivery. Once that was known there was probable cause justifying the Coast Guard to seize the vessel and the contraband and to arrest the crew on board. The decisive actions, which were not taken until shortly afterward, were the taking over of the command and navigation of the ship by the Coast Guard and the arrest and placing of the crewmen into custody under armed guard. Any possible deficiency in the timing of the search in relation to the learning of the destination would be harmless error without question.

The next question to be considered is whether the Coast Guard had lawful authority to stop and board the Lady Ellen in the first place. The Coast Guard initially boarded the Lady Ellen under the authority of Title 14 U.S.C. § 89 (a), which reads as follows:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, ad-

> dress inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

The Fifth Circuit has held in several decisions that this statute authorizes the Coast Guard to stop and board any U.S. vessel on the high seas for the purposes of making a safety and documentation inspection, and that such an inspection under the statute does not violate the United States Constitution. *United States v. Odom,* 526 F.2d 339 (5th Cir. 1976); *United States v. Hillstrom,* 533 F.2d 209 (5th Cir. 1976); *United States v. One Forty-three-foot Sailing Vessel,* 538 F.2d 694 (5th Cir. 1976); and *United States v. Warren,* 550 F.2d 219 (1977). The distinction between a lawful boarding for a safety and documentation inspection and an unlawful extension of the government's intrusion on the vessel is illustrated by

United States v. Warren, supra, where the court, recognizing that no act of Congress can authorize the violation of the Constitution, stated that the Fifth Circuit had held in the foregoing cases that the Coast Guard has authority under the statute to board and make safety and documentation inspections without violating the Constitution. Moreover, "if the Coast Guard, while in the process of conducting a valid safety inspection, discovers evidence providing probable cause to believe a crime has been or is being committed, it [can] extend the search into areas not normally covered by a safety check." The court then held that the Coast Guard may not extend a search for safety purposes beyond that which is reasonably needed to determine if the safety and documentation regulations have been followed, without probable cause that a crime has been or is being committed. In that case the facts were that Drug Enforcement Administration and Customs agents were on board the Coast Guard cutter and made their own independent search of the vessel, which the court condemned as being unconstitutional; and the officers also extracted admissions from the crew without giving them their *Miranda* warnings.

Those decisions also furnished no support to the defendants in our case on another contention they have urged upon this court, that the mere presence of marihuana on board a U.S. vessel upon the high seas does not constitute probable cause that United States laws are being violated in the absence of evidence that the contraband is intended to be imported into the United States. In all of the Fifth Circuit cases discussed the marihuana was discovered by the Coast Guard while making valid inspections for safety and documentation purposes. There was no evidence indicating the destina-

tion of the marihuana in those cases. This confirms the conclusion reached above that even if the search for the marihuana on the Lady Ellen began before the destination of the marihuana was learned, that would not invalidate the subsequent arrest of the defendants and seizure of the cargo. At most, it would be harmless error.

Defense counsel have argued that this court should adopt the view stated by the District Court for the Northern District of California in *U.S. v. Piner,* No. Cr.-78-023-WWS, March 17, 1978, N.D.Cal. The district judge there held that upon the facts presented in that case, the "exercise of the unrestricted discretion to board any vessel at anytime as authorized by [14 U.S.C. § 98 (a)] was unnecessary to effective enforcement of the Marine Safety Regulations, and thus unreasonable." The court held that the statute was subject to the search warrant requirements of the Fourteenth Amendment. The decision, of course, should be read in the light of its facts. The vessel boarded was a private pleasure sail boat (length or other specifications not disclosed) observed sailing in San Francisco Bay at 6:30 p.m. on January 12, 1978. The Coast Guard vessel boarded and announced that it was a routine safety inspection. A boarding officer saw what appeared to be large bags of marihuana in the cabin below, and the persons on board were arrested. There had been no suspicion of any violation of law or safety regulation, except that the Coast Guard captain stated that one reason for boarding was that the weather was such that it made a pleasure cruise unlikely. The court considered these factors: (1) the vital or non-vital nature of the governmental interest and whether it is sufficient to justify at least some intrusive procedure; (2) whether the procedure employed was

"reasonable," including whether there exists an effective but less intrusive alternative procedure, and (3) whether the procedure employed was in fact intended to advance the supporting governmental interest or was a pretext for some other interest. The court noted that the issue there was solely the power of the Coast Guard to conduct ship board inspections in order to enforce regulations for the promotion of safety of life and property on the water under 14 U.S.C. § 2. The court said "Moreover, since defendants were sailing a private pleasure craft, only the inspection procedures directed at private pleasure craft are in issue. *The court will not consider Coast Guard practices with respect to perhaps more heavily regulated commercial vessels*" (emphasis added). In that connection the district court observed, "The practice authorized by Congress and used in this case was *to board, at any time, any vessel* upon the water. The government has made no showing that the exercise of such an unrestricted discretion is necessary to effect an enforcement of the Marine Safety Regulations. In particular, the government has not shown that requiring boat owners to produce their craft for periodic safety inspections, much as many states now inspect automobiles, would be an inadequate enforcement practice. Nor has the government shown that periodic, perhaps even surprise, inspections (supported by a warrant issued upon a showing of administrative necessity) at reasonable times and at dockside would be ineffective." The court went on to say that dockside inspections are precisely the practice contemplated by the Coast Guard itself, quoting from the United States Coast Guard Boarding Manual, 1965 edition, which states in part, "Unless sound reasons exist to the contrary, large vessels engaged in trade should be examined at the dock; pleasure craft, when it will cause them the least inconve-

nience; and commercial fishing vessels when it will not cause their cargo to spoil or cause them delay in reaching their markets . . . . [but the] routine examination of documents, papers, and equipment in the enforcement of the navigation laws is best done when the vessel boarded is at anchor or at a wharf." In a cursory review of the 1977 Coast Guard Boarding Manual introduced into evidence in our case I was unable to find that exact provision, but it does agree with the testimony in this case given by Commander Ikens, Chief of Intelligence, Seventh Coast Guard District. His testimony was that large ships over 250 feet in length can be inspected satisfactorily at dockside because such large vessels are required to keep their safety equipment in place and operable at all times, at the dock as well as at sea. On the other hand, smaller vessels under 250 feet in length are not required to keep their safety equipment in readiness while in harbor, and therefore smaller vessels must be boarded and inspected for safety equipment while they are at sea. Therefore to the extent that the decision by the district court in *U.S. v. Piner* was based upon that factor, it is not applicable to our case, and the boarding here would not be unreasonable from that standpoint. The distinction between large and small ships was not referred to in *Piner,* and must not have been presented to the court. Furthermore it is correct that small private pleasure crafts are subject to less rigorous inspection procedures than larger vessels and commercial vessels. The court in *Piner* also made note of the fact that a border search was not involved there, although the sail boat was inside the Golden Gate Bridge. There was no showing of any movement of the boat into the coastal waters or crossing a border. The court also referred to *U.S. v. Odneal,* 565 F.2d 598 (9th Cir. 1977); *U.S. v. Warren,* 550 F.2d 219 (5th Cir.

1977); and *U.S. v. Stanley,* 545 F.2d 661 (9th Cir. 1976), in addition to the Fifth Circuit cases cited earlier in this memorandum upon the same question. In *Odneal* the Coast Guard boarded a fifty-one-foot two masted sailing sloop in U.S. territorial waters off southern California, for a safety inspection and for registration papers. A Customs patrol officer was on board the Coast Guard cutter in addition to the captain of the cutter. The captain observed that the sails were free and were flopping back and forth, the lines from the sails were dragging in the water and the mizzen mast boom was unsecured and was swaying back and forth, all of those creating a dangerous condition. The court held that the hazardous conditions observed by the Coast Guard authorized it to stop and detain the vessel for the purpose of calling attention to the safety hazards and for the purpose of checking the registration of the vessel. Also, the Customs Officer noticed a strong odor of marihuana coming from the yacht as the boarding party pulled alongside the sail boat before boarding, and the court held that this gave the Customs Officer independent grounds of probable cause to board and detain the vessel. Marihuana was found on board and the conviction of the persons on board was affirmed. Due to the existence of probable cause to board and search, the court refrained from deciding whether Section 98 (a) constitutionally authorizes a boarding for inspection for safety and documentation without probable cause. The court said that it did not have to decide whether it would agree or disagree with the approach taken by the Fifth Circuit in *Odom, Hillstrom,* and *One Forty-three-foot Sailing Vessel,* all *supra.* The Ninth Circuit held that a "border search" authorized the boarding and seizure of the vessel carrying marihuana, under the authority of 19 U.S.C. § 1581 (a), and not pursuant to

§ 98 (a) as in our case. The court considered a border search to be an exception to the probable cause requirements which the court would otherwise require in searches under § 1581 (a). While the Ninth Circuit appears to be approaching a firm rule subjecting § 98 (a) to the requirements of the Fourteenth Amendment in the absence of probable cause or other justifications for boarding, it is not yet explicitly so held with regard to that statute. The Fifth Circuit has taken a positive stand that warrantless boardings of vessels without probable cause are authorized under § 98 (a). Furthermore, the facts of the district court case of *U.S. v. Piner* and the reasons given by the court for its ruling distinguish it from the Fifth Circuit cases. This court concludes that the governmental interest in making safety and documentation inspections – especially the necessity of inspecting smaller vesels at sea for those purposes – is sufficiently important to justify a warrantless boarding for safety and documentation inspection, and thus outweighs the privacy interests of the owners and occupants of such vessels.

Defense counsel finally have argued that even if the Coast Guard could constitutionally board the Lady Ellen without probable cause for a safety and documentation inspection, the evidence will show that such was not the purpose of the boarding, but rather that the purpose was to search for contraband narcotics and that the safety and documentation inspection was a pretext, citing *U.S. v. Warren, supra,* along with some nonseagoing cases. *U.S. v. Warren* held that the original authority to board the vessel was vitiated by the fact that Drug Enforcement Administration agents and Customs agents boarded the vessel along with the Coast Guard officers and participated in the boarding and search. Those agencies have no lawful authority to

board and search on the high seas, and the Coast Guard has no lawful authority to delegate its authority to them. Therefore the evidence derived from the efforts of those agents was unconstitutionally obtained. Furthermore the court held that the crew was interrogated and information was obtained from them leading to the discovery of the marihuana in violation of their *Miranda* rights. The court did not abrogate the seizure because of any pretext by the Coast Guard. As a matter of fact, in *Odneal,* the Ninth Circuit stated "The Coast Guard and the Customs officer each had an independent justification for a brief investigatory stop of the vessel. The fact that they cooperated with one another in no way impairs the justification for the stop. Neither agency was using the other as a stalking horse."

The final question for a decision is the standing of the various defendants to challenge the Coast Guard's seizure of the Lady Ellen and its cargo of marihuana. All of the defendants contend that they have standing to assert the motions to suppress. The basic requirements to establish standing are stated in *Brown v. United States,* 411 U.S. 223 (1972). A defendant has standing where (a) he was legitimately on the premises at the time of the contested search and seizure; (b) alleges a proprietary or possessory interest in the premises or a possessory interest in the seized evidence; or (c) was charged with an offense which includes as an essential element the possession of the seized evidence at the time of the contested search and seizure. The last category confers "automatic standing" upon a defendant charged with such an offense, as established in *Jones v. United States,* 362 U.S. 257 (1959). A defendant with automatic standing formerly had to undertake the embarrassing and perilous step of alleging or offering evidence that he

had possessory rights in the evidence at the time of seizure, but that hazard was eliminated by *Simmons v. United States,* 390 U.S. 377, 394 (1968). In the present case possession of the marihuana is not an essential element to be proved on the charge of conspiracy to import marihuana or on the charge of importing marihuana, and there is no automatic standing pursuant to *Jones.*

Since defendants Harper and Rowe were crew members present on board the Lady Ellen when the marihuana was seized and were sharing in the possession of it, they clearly have standing. Defendants David Raymond Govus and David Ray Jenkins have filed identical affidavits reading as follows: "I had a proprietary interest in the vessel 'Lady Ellen' and the marijuana onboard said vessel up to and through the search of the same and until the seizure of the same." Defendants John White and James M. Burdine have filed identical affidavits reading as follows: "That on or about the 26th day of January, 1978, and at all times thereafter relevant to Defendants' Motion to Suppress, he maintained a legitimate proprietary interest in the vessel 'Lady Ellen' and its cargo." Defendant Govus called D.E.A. Agent Johannesen as a witness during the hearing, and elicited hearsay testimony that a person called "Sam," was known to be defendant Govus, owned a proprietary in the Lady Ellen and its cargo. Govus himself testified asserting a privacy interest in the house at Back Creek and property in it, but offered no testimony about the Lady Ellen and did not assert in his testimony a proprietary or possessory interest in the vessel or its cargo. Defendants White and Jenkins also testified, but failed to assert any proprietary or possessory interest in the Lady Ellen or its cargo. Defendant Burdine did not testify.

To challenge the claims of interest in the Lady Ellen, the government introduced testimony and exhibits through Eleanor H. Jones, United States Coast Guard vessel documentation officer stationed at Elizabeth City. Government exhibit No. 9 is a Consolidated Certificate of Enrollment and License, the permanent Certificate No. 92 of the vessel Lady Ellen, showing that the vessel has been duly enrolled at the port of Mobile, Alabama and that license is granted for the vessel to be engaged in mackerel fishery for one year, and the license was dated April 26, 1977 and signed by Marie K. Hathaway, Documentation Officer at Mobile, Alabama. The Coast Guard seal was affixed to the license. The Consolidated Certificate of Enrollment and License (hereafter called "License") is given to the owner when issued. Coast Guard regulations require that the License be kept on board the vessel and be exhibited to Coast Guard documentation officers and marine inspection officers upon specified occasions. The License designated Mobile, Alabama as the original home port. On the reverse side of the License there is a Preferred Mortgage Endorsement showing Lady Ellen, Inc. as mortgagor, and a mortgage for $180,750.00 to the United States of America through the Secretary of Commerce. That endorsement is signed by Marie K. Hathaway, Coast Guard Documentation Officer at Mobile, Alabama, and bears the Coast Guard seal. On the face of the License William A. Thompson, Jr., Bayou la Batre, Alabama, is shown as president of Lady Ellen, Inc. and as master of the vessel. The next entry on the reverse side of the license is an Endorsement of Change of Master No. 1, and shows that at the port of Mobile, Alabama on October 26, 1977 "Roy Smith, having taken the oath required by law, is at present master of the within-named vessel," in place of William A. Thompson, Jr. The en-

dorsement is signed by the same documentation officer at Mobile. Directly beneath that endorsement is Endorsement of Change of Master No. 2, showing that at the port of Mobile, Alabama on January 10, 1978, "Paul J. Chapman, having taken the oath required by law, is at present master of the within-named vessel" in place of Roy Smith, again signed by the documentation officer.

The witness Jones, Coast Guard Documentation Officer at Elizabeth City, testified that her office received the license in the mail on January 20, 1978 contained in an envelope with a letter from Mull and Sweet, a law firm in Alabama. The next document chronologically produced by Mrs. Jones is a General Index or Abstract of Title, Coast Guard Form CG-1332, giving a title history of the Lady Ellen. The abstract shows that the vessel was built at Theodore, Alabama in 1977 by Quality Marine, Inc. for Lady Ellen, Inc.; that a purchase mortgage for $180,750.00 dated April 26, 1977 was given by Lady Ellen, Inc. to the United States of America acting through the Secretary of Commerce, and shows the recording data in the office at Mobile, and also shows that the entire interest in the vessel was conveyed by the mortgage. The only other entry in the abstract was that on January 10, 1978 the United States as grantor gave to Lady Ellen, Inc. an instrument of satisfaction of purchase mortgage in the amount of $180,750.00 covering the entire interest in the vessel. The recording data is also shown. Beneath those certificates is a certificate by Marie K. Hathaway, Documentation Officer at Mobile, that the abstract, "Issued . . . incident to a change in home port, is a true abstract of title of vessel described above, as appears by the records in this office." Attached to the abstract is a transmittal letter dated January 25, 1978 at Mobile,

Alabama, and signed by Marie Hathaway, Documentation Officer, and is addressed to Vessel Documentation Officer, U.S. Coast Guard, Elizabeth City, N.C., and reads as follows: "In accordance with the request of John F. Sweet, Attorney at Law, 990 Edgewood Avenue, NE, Atlanta, GA., there is enclosed an Abstract of Title, cg-1332, in duplicate, covering the Oil Screw Lady Ellen, official number 581674, issued under the provisions of 46 CFR 67.47-27 (46 USC Sec. 18, C.F.R. U.S.C. 926) for change of home port to your port." Underneath the signature appears "Remarks: Outstanding Marine Document: P.E. 92 issued at Mobile, AL. on 4/26/77." Underneath that it is shown that a copy is directed to "John F. Sweet." The certificate of the documentation officer and her transmittal letter to the Coast Guard at Elizabeth City, with a copy to the attorney, shows that the abstract was received by the Coast Guard at Elizabeth City from the documentation officer at Mobile. The change of home port from Mobile to Elizabeth City is also shown by the two remaining documents produced by Mrs. Jones as government exhibit 9. The first is Coast Guard Form CG-1319, Designation of Home Port of Vessel. It is dated January 27, 1978, addressed to the documentation officer at Elizabeth City, North Carolina and designates Elizabeth City as the home port of the Lady Ellen. It states that the vessel business of the owner or owners named below will be conducted at and from Box 435, Wanchese, North Carolina, and it is signed Walter Poole, President of Lady Ellen, Inc. The other document is Coast Guard Form CG-1259, Oaths on Registry, License, or Enrollment and License of Vessel. On the face of the form is the oath of officer or agent of incorporated company. It shows the port of Elizabeth City, N.C.; that the vessel is engaged in fishing service; that the owner is Lady Ellen, Inc., and Walter N. Poole, as

president; the address of the corporation being Box 435, Wanchese, North Carolina; that the state of incorporation is Alabama; that the name of present master is Paul J. Chapman, born at Monroe, North Carolina on July 21, 1944; and the signature of Walter Poole is attested on January 27, 1978 by Vera Mitchell, notary public of the State of Georgia. On the reverse side of the form is the master's oath showing Paul J. Chapman as name of master with the same Wanchese address, signed by Paul J. Chapman, and attested January 27, 1978 by Vera Mitchell, notary public. Those last two documents were received in the Coast Guard Office at Elizabeth City on February 13, 1978 in an envelope from the attorneys, presumably Mull and Sweet at Atlanta. Although Mrs. Jones stated earlier in her testimony that the license was received by attorneys in Alabama, I find from the transmittal letter from the documentation officer at Mobile attached to the Abstract of Title that the attorneys are located at Atlanta, Georgia.

Defense counsel challenged the authenticity and admissibility of the foregoing documents based upon Mrs. Jones' testimony that she had no personal knowledge of the execution or filing of any of the documents; that the documents had been received by her office in the mail in the ordinary course of business; and that the Coast Guard documentation office at Elizabeth City had not assigned a docket number to the file and had taken no action upon the documents. She explained the lack of action by her office through her testimony that she was awaiting further communications from the owners, including the receipt of the instrument of satisfaction of the mortgage, before taking official action; and that on February 13, 1978, the same day she received the last two documents from the attorneys in Atlanta, Coast Guard headquarters at Norfolk, Virginia notified her of

the seizure of the Lady Ellen and instructed her to take no action regarding it.

On the other hand, I find that the only documents which lack official authentication are the two documents received from Atlanta on February 13, and dated January 27, 1978, designating Elizabeth City as the home port and Paul J. Chapman as the new master. Even those two documents are not necessarily rendered inadmissible by lack of official authentication. They are applications to the Coast Guard transmitted to the documentation office for filing pursuant to regulations.[1] They are not evidence of any substantive fact, but only of the fact that such applications for the purposes stated were received by the Coast Guard at Elizabeth City. Substantiating evidence for their transmission to Elizabeth City is contained in the transmittal letter of the Coast Guard from Mobile to Elizabeth City attached to CG-1332, Abstract of Title, stating that a change of home port was the reason. The documents tending to show record title and ownership of the Lady Ellen are the License and the Abstract of Title, both of which were authenticated over the signature of the Coast Guard documentation officer at Mobile and bearing the Coast Guard seal. A chain of custody of the license document is unnecessary, because it is delivered to the owner at the time of issuance, and the Coast Guard regulations, including those printed on the envelope in which the license was enclosed, require that the owner retain it and keep it on board the vessel at all times except when it is in the possession of documentation or inspection officers or at other specified times. The license was transmitted to the documentation officer at

[1]All these documents are also authenticated by Rule 901(7), Fed. Rules of Evidence. The License and the Abstract of Title are admissible under Rule 803(8) and (15).

Elizabeth City, as required, in connection with the change of home port designation from Mobile to Elizabeth City. The transmittal letter from the Coast Guard at Mobile to the documentation officer at Elizabeth City sufficiently accounts for its receipt in Elizabeth City. On the other hand, the applications dated January 27 and received in Elizabeth City on February 13 are not necessary documents in the history or abstract of the vessel or in any chain of title. It is immaterial that no action was taken by the documentation officer at Elizabeth City respecting any of these documents, in order for them to be received in evidence through their original and official authentication by the documentation officer at Mobile.

I therefore find that record title to the Lady Ellen, insofar as the license and abstract constitute proof of record title, which is not decided at this time, rests in Lady Ellen, Inc., an Alabama corporation. This is not to say that defendants Burdine, Govus, Jenkins and White, who filed the affidavits of proprietary interest recited above, may not have a proprietary interest in the Lady Ellen and its cargo, as may any or all of the defendants. It is possible that the statement under oath that the corporation was the sole owner of the Lady Ellen on April 26, 1977, as shown in the License, was false, and that the corporation owned less than the entire interest in the vessel, or no interest at all. It is possible that these four defendants were the sole owners, or shared ownership with the corporation or with other unnamed persons, or both. It is also possible that subsequent to the date of the license, April 26, 1977, the corporation transferred all or part of its interest to these four defendants or to other persons. In any of those events, it is apparent that serious irregularities occurred

with respect to documents submitted to the Coast Guard.

In order for a defendant to establish standing, he must assert the grounds for his claim of standing at the suppression hearing. *Brown v. United States, supra; United States v. Boston,* 510 F.2d 35 (9th Cir. 1974); *United States v. Prueitt,* 540 F.2d 995 (9th Cir. 1976); and *United States v. Williams,* 536 F.2d 810 (9th Cir. 1976). If a defendant fails to assert his proprietary or possessory or privacy interest at the hearing, he has lost his opportunity. As the court said in Boston, "We now know the truth to be that appellant at the time of seizure did in fact claim as his the heroin seized. It was on that basis that he was convicted. But truth as it emerges from trial cannot reach backward to confer standing to move to suppress. Rather it is the showing made by the defendant at the time he moves to suppress the counts . . . his concession . . . cannot now be used against him at trial . . . but it is a concession that must be made."

It is true that a defendant need not take the witness stand and testify to his grounds for standing if he has presented an undisputed affavit asserting it. However the affidavit must state facts sufficient to demonstrate a genuine basis for standing, and a general or conclusional affidavit is not enough. In *United States v. Williams, supra,* the court said "As the government conceded during oral argument, an undisputed affidavit, or undisputed affidavits, alleging facts that demonstrate a legitimate proprietary or possessory interest in the premises searched, could establish one's standing without his being required to testify. But the government contends that it did, in fact, challenge appellant's affidavit and thereby put him to proof of his declara-

tions." The court in Boston also said "Neither jury verdict nor governmental contention can serve to relieve the defendant of his burden in those cases where automatic standing does not serve to relieve him."

Defendants urged the court to accept a general and nonfactual affidavit like those filed in this case as a satisfactory showing of standing, as they say was done in *United States v. Prueitt, supra.* But the Ninth Circuit in that case did not rely upon an affidavit alone. The court stated, 540 F.2d at 1005, "The record indicates that only one defendant, Robert Lee Prueitt, asserted a possessory interest over the evidence seized at the motion to suppress (R.T. 226). Later, Prueitt filed an affidavit that 'at the time of the seizure of the marihuana that I had a possessory interest in said marihuana and dominion and control over the same.' (See C.T. 171-72) The other defendants failed to allege a possessory interest in that which they sought to suppress. It was imperative that this concession be made. By failing to meet this burden, all defendants except Prueitt do not have actual standing." Prueitt's grounds for standing were first asserted by him at the suppression hearing. In *Williams, supra,* the Ninth Circuit said that an unchallenged affidavit cannot establish standing, when it said that the government by challenging appellant's affidavit, thereby put him to proof of his declarations. The court did not have to rest its decision on that ground, because the court held that even if the affidavit were found to be unchallenged, it would not be sufficient to establish the required standing. This court has seen no decision accepting solely a disputed affidavit to establish standing.

Defense counsel argue strenuously that even though a defendant's statement that he owned or had possession

of the contraband at the time of seizure cannot be used against him at trial, *Simmons v. U.S., supra,* that Fifth Amendment infringements might result, as was claimed in *Harris v. New York,* 401 U.S. 222 (1970), if the government should use the statement on cross-examination to impeach the defendant. I believe the Supreme Court's opinion in that case applies also when the statement is made by a defendant claiming rights under the Fourth Amendment just as under the Fifth Amendment. Furthermore, problems of that kind can well be handled by the trial judge.

Since the government has satisfactorily challenged the affidavits submitted by defendants Govus, Jenkins, Burdine and White, they were required to assert their claims at the hearing, which they did not do. While a witness called by Govus testified to some hearsay that a man named Sam owned a proprietary interest in the Lady Ellen and its cargo, that would be too general to meet the requirements set out by the cases discussed above. He had an opportunity to assert his claim when he was testifying. The affidavits submitted by defendants Jenkins, Burdine, and White suffer from the same deficiency. The court concludes that none of these four defendants have standing based upon the three affidavits and the inadequate hearsay testimony elicited from witness Johannesen on behalf of Govus. Nevertheless, some language in *Williams, supra,* intimates that the trial judge may have discretion to hear testimony on standing before trial. Any defendants who wish to substantiate a claim of standing might consider making such a request.

Even if we assume *arguendo* that contested affidavits would be acceptable to establish standing, these affidavits and the testimony about Govus do not state any

facts giving rise to a reasonable expectation of privacy, as required by *Boston* and *Williams,* both *supra.* Proprietary and possessory rights must be such as would create such an expectation of privacy. Not all holders of nominal title to property have such a connection with the property as to create such rights. *Jones v. United States, supra,* said that traditional concepts of property law "ought not to be determinative in fashioning procedures ultimately referrable to constitutional safeguards." In *U.S. v. Archbold-Newball,* 554 F.2d 665 (5th Cir. 1977), two defendants argued a possessory interest in marihuana which they had purchased, and had shipped a large quantity of it to two other persons several months before the seizure, and had only received a small partial payment for it, and still retained a proprietary interest in the drugs at that time. The court said that in view of the shipment by defendants of the drugs to the other persons, it was "difficult to discern what privacy interest of the appellants was violated by the government search." In *U.S. v. Johnson,* 456 F.2d 295 (5th Cir. 1972) Johnson gave one Langner four hundred and fifty dollars to go to Mexico and buy marihuana and bring it back to him, and provided Langner with the vehicle for use in the importation. Langner was arrested on his way back and the marihuana seized, and Johnson claimed standing to contest the seizure, as owner of the drug with rights of possession. The Fifth Circuit denied standing to Johnson. He had never had possession of it and the seizure was before he had seen it.[1] Thus owners of property are not automatically entitled to an expectation of privacy concerning it. *Brown v. U.S., supra,* said "Fourth Amendment rights or personal rights which, like some other constitutional rights,

[1]Our defendants (other than the crew) had never seen the marihuana according to the evidence, when it was seized at sea.

may not be vicariously asserted." A similar case is *U.S. v. Hunt,* 505 F.2d 931 (5th Cir. 1974), *cert. den.* 421 U.S. 975. Although the court regarded the arrangement more of an independent contractor relationship than a purchase. *U.S. v. Williams, supra,* clearly shows the necessity of alleging sufficient facts to show the nature of the rights of the defendant in the property.

Finally, all defendants claim standing to challenge the seizure of the Lady Ellen, not based upon proprietary or possessory rights, but upon their argument that the indictment itself confers standing upon them, and second, that they were victims of a continuing search directed at each of them.

Their first argument is that the government has alleged in the indictment that all of the defendants conspired together over a period of ten months ending on the date of their arrest on February 5, 1978 to import the marihuana that it had seized on the Lady Ellen at sea. They interpret the indictment to show that all of the defendants were business partners in a common or joint venture that had a proprietary or possessory interest in the Lady Ellen and the house on Back Creek and the evidence found inside them, and that as business partners they had common interest in the property belonging to the joint venture, and that they had in common a reasonable expectation of privacy in them regardless of whether they were nominal titleholders. They say further that the indictment alleges that the business venture held the proprietary or possessory interest in the vessel and house right up to the time of the searches at Back Creek, when the property was still being used in the service of the joint venture in which the defendants were allegedly participating.

Defendants cite several cases in support of their first argument: *Mancusi v. DeForte,* 392 U.S. 364 (1968) and *Baker v. United States,* 401 F.2d 958 (D.C.Cir.1968). Those cases involved the use of business offices by business associates, a sharing of possessory interest in property. It is not to question the authority of those decisions to say that they do not reach far enough to create a reasonable expectation of privacy on the Lady Ellen or in the house solely because of the common interest alleged in the indictment. Defendants also cite several cases in which the defendant had permissive use of premises or shared the use of premises with another and was legitimatley on the premises at the time of the search, or was the owner of property seized on the premises in his absence. *Jones v. United States,* 362 U.S. 257 (1960); *Simmons v. United States,* 390 U.S. 377 (1968); and *United States v. Jeffers,* 342 U.S. 48 (1951). Those decisions, however, come clearly within the standard set by *Brown v. United States,* 411 U.S. 223, 228 (1973), quoted earlier, and do not support this argument of defendants.

The second ground for the motion by these remaining defendants is based upon the argument that they were the victims of a continuing search carried out by the government and directed against them from the time of the initial seizure of the Lady Ellen at sea; that the Coast Guard knew that such smuggling operations are carried out by more people than those on the vessel; that the government used the vessel, the crew and the marihuana as a "lure" to catch the other people involved. Defendants' briefs state "Thus, the search was directed at more than the crew on the vessel. The officers conducted the search with the objective of catching at least the persons who would *participate in the*

unloading, even though at the time of the search, they did not know the identity of those persons (emphasis added)." The authorities advanced by defendants for that argument are *Jones v. United States,* 362 U.S. 257 (1959) and *United States v. Cobb,* 432 F.2d 716 (4th Cir. 1970). In *Jones v. U.S.,* Jones was arrested in an apartment belonging to a friend of his named Evans, who had given him the use of the apartment and the key. The officers were executing a warrant to search for narcotics, and found narcotics in a bird's nest in an awning just outside a window of the apartment. Shortly before that an officer outside the building had seen Jones put his hand on the awning. Jones admitted that the narcotics were his. At the motion to suppress the narcotics, Jones testified about the key and his use of the apartment by permission of Evans; that his home was elsewhere, that he had a suit and shirt at the apartment, paid nothing for its use, and that he had slept there "maybe a night." The Supreme Court decided that principles of property law, and distinctions between lessee, licensees, invitees, and guests, should not be the sole determinative in deciding upon the reasonableness of searches and seizures under the Fourth Amendment. The Supreme Court said "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."

The Fourth Circuit followed *Jones v. U.S., supra,* in *United States v. Cobb,* 432 F.2d 716 (4th Cir. 1970), in which the officers suspected Cobb of transporting nontax-paid liquor. The officers had Cobb under surveillance at a time when he was occupying an automobile owned by another man who was not under any kind of suspcicion. The officers arrested Cobb away from the automobile, took him back to it, and with an

invalid search warrant they searched the car and found the illegal whiskey. The court held that Cobb was the victim of the search because it was directed at him, and even though he had no proprietary or possessory interest in the automobile, he had standing. Defendants' brief in discussing *U.S. v. Cobb,* quoted the Fourth Circuit as follows:

> "The distinction is thus made between the situation where the person moving to suppress was the person against whom the search was directed and that which arises when the challenged evidence was procured 'as a consequence of a search or seizure directed against someone else.' In the first case, the person against whom the search was directed has standing to attack the validity of the search; in the second, he has not."

Their brief then mentions two cases cited by the court as examples of the two types of searches, *Stassi v. United States,* 410 F.2d 946 (5th Cir. 1969) and *United States v. Graham* 391 F.2d 439 (6th Cir. 1968). The Fourth Circuit had actually cited *Baker v. U.S., supra,* the "Bobby Baker" case, as an example of a search which was directed against the moving defendant, giving him standing. Both Stassi and Graham involved searches that were not directed at the defendant moving to suppress and they were denied standing.

We must then examine the facts in evidence in this hearing and apply to them the principles declared in *Jones v. U.S.* and *U.S. v. Cobb,* bearing in mind that the quotation from Cobb given above was quoted from the Supreme Court's decision in *Jones,* making the distinction between "one against whom the search was directed, as distinguished from one who claims prejudice

only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."

At the time of the initial seizure of the Lady Ellen the government had no suspicion of any criminal activity relating to the vessel, and at that time the government only learned of Breslin, Harper and Rowe. When they began cooperating with the government and were returned to the Lady Ellen to participate in a controlled delivery of the marihuana, they were in no different a status than the multitude of persons involved in criminal enterprises who are apprehended in the early stages of the undertaking, and then cooperate with the officers by leading them to their confederates. The evidence does not show that the government learned the identities of any other participants in the smuggling operation until the arrival of the Lady Ellen at Back Creek and the raid at the landing site. The defendants' brief states that even during the "continuing search" the officers did not know the identities of those persons. The first thing the officers had to do when they arrested the remaining defendants at Back Creek and the surrounding area was to ascertain their identities. Defendants contend that the continuing search was to locate and identify defendants and seize evidence, all of the same being tainted by the "fruit of the poisonous tree," the initial alleged unlawful seizure of the Lady Ellen; and that the continuing search ended with the unlawful arrests of the defendants. But that argument is too tenuous to meet the requirements laid down by the Supreme Court in *Brown v. United States, supra.*

In fact, according to the evidence, the government had information from Paul Breslin, that various persons were waiting to unload the marihuana, and that the unloading site would be somewhere along the in-

tracoastal waterway in Carteret or Craven counties. It was only because of aircraft surveillance of the Lady Ellen that the officers learned of her progress through Beaufort Inlet and northward along the waterway, and air surveillance informed the officers on ground when the Lady Ellen was met by small boats and began unloading, and the officers on ground were directed to the landing area by the aircraft. The search was in no way directed at these named defendants, but rather was directed at the persons who arrived at the scene in accordance with their own mutual plan to carry out the unloading. These circumstances are far removed from the search and seizure in *U.S. v. Cobb, supra,* and the other decisions relied on by defendants. *U.S. v. Graham* and *Stassi v. U.S.*, both *supra,* and mentioned earlier, are analogous decisions. In *Graham* the officers opened an automobile door and got the serial numbers of two cars proven to have been stolen. The two defendants who moved to suppress were some miles away from the place of the search and claimed no interest in the cars which were in the possession of their codefendant at the time. The Sixth Circuit denied standing saying "appellants were not ones 'against whom the search was directed,' nor were their rights of privacy impaired in any manner." *Stassi* involved a border search of a suitcase in the custody of a common carrier for transit, located in the baggage section of a bus station over three hundred miles from the place where it was to be delivered to appellant Stassi through his front man, according to the decision. Stassi claimed no interest in the suitcase or its contents or in the premises on which the search was conducted, and he was nowhere in the vicinity at the time. It was months after the search before the government learned that appellant had any connection with the smuggling operation. The Fifth Circuit denied

standing. Thus, a person separated from the seized contraband by distance or by a lapse of time, who does not claim a proprietary or possessory interest in the contraband or the premises, has no standing. Likewise, in *Brown v. U.S., supra,* the stolen goods were seized in a warehouse, and the moving defendants were not there, and claimed no interest in the goods or the warehouse. The charges against them were limited to acts committed before the day of the search. The government's case against them did not depend on their possession of the seized evidence at the time of the seizure. The Supreme Court denied standing. The stolen goods seized had been transported and sold by them to a codefendant two months before the challenged search. The search was not directed at them.

Accordingly, based on all of the foregoing findings, I conclude that the Coast Guard lawfully boarded the Lady Ellen for a safety and documentation inspection, and thereafter had probable cause to search for the marihuana, and that the seizure of the vessel and the marihuana was lawful; that defendants Harper and Rowe have standing to challenge the seizure of the vessel and the marihuana; and that none of the other defendants have such standing. I recommend that these motions to suppress all evidence relating to the Lady Ellen and its cargo be denied.

This 16th day of June, 1978.

/s/ Logan D. Howell
LOGAN D. HOWELL
UNITED STATES MAGISTRATE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
OF NORTH CAROLINA
NEW BERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	NO. 78-08-CR-4
	)	
VS.	)	
	)	
DONALD ALFRED BLACK,	)	ORDER
HERBERT FRANKLIN CLARK,	)	
GARY REGAN TALBERT, et al.,	)	
	)	
Defendants	)	

All defendants in this action have moved to suppress evidence obtained as a result of the initial search and seizure of the Lady Ellen on the high seas by the United States Coast Guard. In an extensive memorandum of decision, United States Magistrate Logan D. Howell has recommended denial of these motions. Upon review of the record, the memorandum of the Magistrate, and the objections lodged by the parties, the court concludes that the line of Fifth Circuit authority relied on by the Magistrate in sustaining the search and seizure allows the admissibility of the evidence at trial. *United States v. Odom,* 526 F.2d 339 (5th Cir. 1976); *United States v. Hillstrom,* 533 F.2d 209 (5th Cir. 1976); *United States v. One 43-Foot Sailing Vessel,* 538 F.2d 694 (5th Cir. 1976); *United States v. Warren,* 550 F.2d 219 (5th Cir. 1977).

Marshall v. Barlow's, Inc., 98 S.Ct. 1816 (1978), does not alter this conclusion. Rather than laying down a blanket rule requiring a warrant for every administrative search by a government official, *Barlow's* cautioned that "[t]he reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply." At 1825. Commercial shipping is such an enterprise. Since the early days of the republic federal officials have had the authority to board and inspect American flag ships. See Carmichal, *At Sea With the Fourth Amendment*, 32 U.Miami L.R. (1977). The historical origins of this practice suggest that those who choose to sail under the American flag have no justifiable privacy interest that bars these intrusions. Such regulatory inspections have their basis in the international law of the seas that requires each nation to carefully maintain the navigability and safety of its own commercial fleet as a condition for non-interference by other nations. *Cf. United States v. One 43-Foot Sailing Vessel*, 405 F.Supp. 879 (S.D.Fla. 1975), *aff'd*, 538 F.2d 694 (5th Cir. 1976). The efficiency of the regulatory program would be greatly undercut if action were stalled until an "administrative" search warrant could be procured from a land-based judicial official located hours and miles away. Accordingly, *Barlow's* does not require that Coast Guard searches pursuant to 49 U.S.C. § 89(a) be authorized by warrant.

Defendants' motion to suppress is denied for the reasons stated above and in the Magistrate's memorandum which is incorporated herein.

SO ORDERED.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

July 3, 1978

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION

[Filed June 20, 1978
John R. Whitty, Clerk
U.S. District Court
E. Dist. No. Car.]

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
DONALD WINSTON HARPER	)	No. 78-08-01-CR-4
MICHAEL BENJAMIN FORBES	)	No. 78-08-02-CR-4
JOHN WHITE,	)	No. 78-08-03-CR-4
a/k/a Leroy J. Edwards,	)	
a/k/a Roy Edwards	)	
DONALD ALFRED BLACK	)	No. 78-08-04-CR-4
HERBERT FRANKLIN CLARK	)	No. 78-08-05-CR-4
DAVID RAY JENKINS	)	No. 78-08-06-CR-4
JAMES MERRILL BURDINE	)	No. 78-08-07-CR-4
RICHARD LEWIS JACKSON	)	No. 78-08-08-CR-4
DAVID RAYMOND GOVUS,	)	No. 78-08-09-CR-4
a/k/a Sam,	)	
a/k/a Melvin Hawkins	)	
PAUL JEROME BRESLIN	)	No. 78-08-10-CR-4
PETER FORBES	)	No. 78-08-11-CR-4
ROBERT McNEILL HERRING	)	No. 78-08-12-CR-4
NEIL WILSON ROWE	)	No. 78-08-13-CR-4
GARY REGAN TALBERT	)	No. 78-08-14-CR-4

MEMORANDUM AND RECOMMENDATION ON MOTIONS TO SUPPRESS THE SEARCHES AND SEIZURES AT BACK CREEK

All defendants have moved to suppress all of the evidence gathered by the government as a result of its second seizure of the Lady Ellen and the marihuana on

board at Back Creek, and as a result of its seizures of evidence and marihuana at the dock, and in a storage shed at the dock, vehicles parked on the premises adjacent to the dock, and in the house nearby on the same premises, as well as in small boats next to the dock. Defendants contend that these searches and seizures violated their rights under the Third, Fourth, and Fourteenth Amendments and under 18 U.S.C. § 1385. These and numerous companion motions were the subject of an evidentiary hearing over a period of three and one-half weeks. The facts which are pertinent to the determination of these motions will be summarized.

The events at Back Creek in Carteret and Craven Counties beginning before dawn on February 5, 1978 represented the second act in a drama which began nine hundred miles away in the Atlantic Ocean on January 26 when the Coast Guard boarded and seized the Lady Ellen in Mona Passage, as related in the court's separate opinion dealing with that seizure, and which should be referred to insofar as any of its findings and conclusions should be applicable to these motions. As described in that opinion, the master of the vessel, Paul Breslin, and the two crew members, defendants Harper and Rowe, agreed to cooperate with the government and participate in a controlled delivery of the marihuana on the Lady Ellen to its destination in the United States. The Coast Guard, the Customs Service, and the Drug Enforcement Administration cooperated in the planning of the controlled delivery, with the Drug Enforcement Administration directing and coordinating the effort. The Coast Guard Cutter Alert escorted the Lady Ellen in convoy most of the way, until aerial surveillance could be commenced from the shore. D.E.A. agent Jimenez and Customs agent Martinez were flown to Wilmington before the convoy reached North Carolina to meet with

the group of officers from those agencies, as well as North Carolina State Bureau of Investigation officers, State A.B.C. Officers and deputy sheriffs from Carteret and Craven Counties. Breslin, Harper, and Rowe were returned to the Lady Ellen for the last part of the voyage, and on Saturday night, February 4 the Lady Ellen, with Breslin again in command, passed through Beaufort Inlet at approximately nine p.m. and proceeded northward along the intracoastal waterway. The vessel was under observation by government aircraft as it steamed along the waterway.

During several days of the voayage agents Jimenez and Martinez had many hours of conversations with Paul Breslin in which he informed them about the voyage to Columbia to pick up the marihuana and the plan to deliver it to an unloading site in North Carolina. Through Breslin the D.E.A. and the other two services learned that an unspecified number of other persons would be waiting prepared to unload the marihuana at one of several possible landing places. The officers knew that there were forty-two thousand pounds of marihuana to be unloaded, and had learned from Breslin that several large trucks would be at the landing site to remove the marihuana.

With that much information from Breslin about the plan to unload the marihuana in the general area of the intended unloading site, the combined force of law enforcement officers had a briefing session at Wilmington Friday afternoon and then separated and went to two or more hotels in Carteret County to await information about the arrival of the Lady Ellen.

At approximately three thirty a.m. on February 5 a message was received at law enforcement headquarters in the Fisheries Resources Department Building at

Morehead City that their lookout boat may have been spotted, and orders were given for the officers to proceed by automobile toward the general area of Back Creek. The aircraft overhead reported that the Lady Ellen had turned from Adams Creek into Back Creek toward the shore, and that one or more small boats approached the vessel and several persons from the boats boarded the Lady Ellen, and that the small boats began to depart the Lady Ellen loaded with bales, and proceeded to the dock on the premises referred to earlier where the empty trucks were waiting.

The ground officers were traveling north in their automobiles on highway 1300, the only paved road in the area, not knowing just where they were supposed to go. Some of the cars got lost on dead-end dirt roads, but as the operation focused on the landing site and the aircraft observed the loaded boats approaching the dock, the pilots were able to radio messages to the automobiles giving them better directions to the area. D.E.A. agents Hinchman and Rousseau and several North Carolina S.B.I. agents reached the premises by a dirt road, the only access to the premises and dock. When they got out of their cars no one was in sight around the dock. Agents Hinchman and Rousseau began looking for suspects on the premises toward the house two or three hundred yards away. The state officers went to the dock and saw small boats ladened with bales of a substance later determined to be marihuana, and three large trucks backed up to the water's edge, and also a loading ramp. There were also several smaller camper pickup trucks. They observed that the inside of the trucks were lined with a black plastic held in place with gray duct tape. As they were searching the area they discovered a man later identified as Peter Forbes hiding near the dock lying face down in

the marsh grass. Forbes was taken to the storage shed on the dock and handcuffed.

Meanwhile agents Hinchman and Rousseau had found no one on the premises or in the woods, and at approximately 5:00 A.M. they approached the house and noticed that light was showing through the blinds in the front rooms, and they could see forms moving back and forth. They walked up to the steps of the small front door stoop and both knocked loudly on the door, and there was some kind of response from within the house. At this point the evidence is in dispute. Passing by for the moment what happened at the time of entry, the officers did enter the front room and saw three men before them in the room, who were later shown to be defendants Richard Jackson, David Jenkins, and John White. Two of the men were sitting on sofas in front of which was a coffee table, and on the table the agent saw various electronic devices, a police scanning radio receiver, a CB transmitter and receiver, and a power booster. Hinchman heard law enforcement transmissions being received on the scanner.

The three men were wearing heavy work clothes and heavy long rubber boots. Two pairs of work gloves were in sight, and duct tape similar to that seen in the truck fastening the plastic liner, and a roll of duct tape on a table. The officers asked all three men for identification, and two of them furnished identification. Mr. White was asked to produce something that was bulging in his pocket, and he handed over a wallet from which the officer read the identification "Leroy Joseph Edwards." At that point Hinchman told all three that they were under arrest. The men were searched and the officers read them their *Miranda* rights. Other officers came in and a search was made of the rest of the house to learn

whether any other persons might be hiding, a search of any area large enough for a man to hide in. Then the three defendants were taken to the storage shed and placed in custody there along with Peter Forbes, until officers could transport them to headquarters at the Fisheries Building for routine processing, and then to New Bern for initial appearances before the federal magistrate C.K. McCotter, Jr.

Meanwhile, Hinchman remained in the front room of the house to secure it and prevent any unauthorized persons from entering and prevent any searches to be made of the house until a search warrant could be obtained. It was quite cold that morning and several of the officers would come into the house to stay warm for a while, and were in and out during the day.

At approximately seven thirty A.M. Carteret County Deputy Sheriff Gerald Smith left the house and saw a man walking on the road who was later identified as defendant Benjamin Forbes. He was wearing heavy work clothes and long rubber boots like those worn by the men in the house. Smith told Forbes to get into the car and Smith drove to the house and turned him over to D.E.A. agent Dorsey, who questioned him concerning his identity. He told Dorsey who he was and Dorsey asked him where he had been, his reply being that he had spent all night at Morehead City. Dorsey learned that he lived in the house, and placed Forbes under arest.

Returning to the movements of the Lady Ellen after its unloading operation was interrupted by the aircraft and helicopter at approximately four A.M. that morning, a Customs Service patrol boat began pursuing the vessel north on Adams Creek as it approached the Neuse River, and drawing close, ordered the vessel to

heave to for a boarding party. When the officers boarded the vessel they placed everyone on board under arrest and read them their*Miranda* rights and seized a large amount of marihuana still on board. The defendants who were arrested on board were identified as Donald Harper, Donald Black, Herbert Clark, James Burdine, David Govus, Paul Breslin and Neil Rowe. The patrol boat and the Lady Ellen proceeded to New Bern where the defendants were later taken before Federal Magistrate C.K. McCotter, Jr. for initial appearanaces.

First, the defendants contend that all searches, seizures and arrests in the Back Creek area were unlawful because they stemmed directly from the allegedly unlawful seizure of the Lady Ellen in Mona Passage, and thus should be suppressed as "fruit of the poisoned tree." But that issue was decided against the defendants in the court's separate opinion dealing with the Lady Ellen, and that argument is foreclosed to them now. Second, they contend that the second seizure of the Lady Ellen and the arrests of defendants on board was invalid because Breslin, Harper, and Rowe had been arrested and were no longer part of any conspiracy, and their actions and statements could not be used to ensnare the other defendants, as I understand the contention. But as pointed out in the court's opinion dealing with the Lady Ellen, it is not unusual in case of a large conspiracy for some members to be arrested early in the course of the conspiracy, and for them to cooperate with the authorities in catching the other members. That is what happened here. There was no entrapment, since the government did not know the other members and obviously did nothing to entice them into the trap. That contention is without merit.

The next question is the lawfulness of the raid on the Back Creek premises, the entry into the house and ar-

rests of the defendants there, and the final search of the house. To begin with, the law enforcement agencies had known for several days that the Lady Ellen bearing twenty tons of marihuana was heading for a landing in North Carolina waters. Information from Breslin had narrowed the possibilities to a stretch of the intracoastal waterway several miles in length. Information from Breslin was that small boats would off-load the marihuana and take it ashore where a number of persons would be waiting with trucks and loading equipment to remove the marihuana. Aircraft surveillance observed the Lady Ellen enter through Beaufort Inlet and proceed up the intra-coastal waterway during the night, and observed it going into Back Creek to be met by small boats which received the bales of marihauna and went to the shore with them to a dock on the premises previously referred to, later known to be premises leased by defendant Peter Forbes from a Mr. Leonard. The officers in the aircraft had seen persons on the Lady Ellen, in the boats, and at the dock removing marihuana and taking it to shore. At that moment the law enforcement agencies had every element of probable cause to go upon the premises for the purpose of seeking out and arresting those persons, and for the purpose of seizing the marihuana and equipment for its removal, and for the purpose of searching for and seizing any other evidence on the premises connected with the smuggling operation, since the premises were obviously being used in carrying out the operation. The Lady Ellen was on a public waterway when some of the defendants unloaded the bales of marihuana and placed it on these premises. As the government's brief said, the officers in the air could see the marihuana being placed on the premises, which "activity was plainly visible to anyone who may have been observing from Back Creek, a navigable stream, or the land surrounding it." There

are neighboring lots of land extending down to the water, and several neighbors testified at the hearing who lived within sight of these activities. As the government's brief also states, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *See Lewis v. United States,* 385 U.S. 206, 210; *United States v. Lee,* 274 U.S. 559, 563."

The Supreme Court held in *U.S. v. Watson,* 423 U.S. 411 (1976) that a warrantless arrest may be made in a public place upon probable cause, and in the same year the court defined "public place" in *U.S. v. Santana,* ____ U.S. ____, 96 S.Ct. 2406 (1976). The officers had probable cause to arrest Santana for selling heroin, and when the police van stopped fifteen feet in front of the front door of her residence they saw her standing in the doorway and recognized her. They got out of their van shouting "police" and displaying their identification. As they approached, Santana retreated into the vestibule of her house. They followed her through the open door and arrested her inside. The court first cited *Watson* on warrantless arrrests in public places, and then said "While it may be true that under the common law of property the threshold of one's dwelling is 'private,' as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a 'public' place. She was not in an area where she had any expectation of privacy." The court then recited the quotation from *Katz* shown above. In *Santana,* a search incident to her lawful arrest disclosed heroin and marked money, which were held admissible.

Since the persons recently seen by the officers in the air to be handling the marihuana at the dock had disappeared, the officers had every reason to know that they

had left the immediate vicinity of the dock and would be attempting to escape arrest. The officers therefore had lawful authority to seek them out and search all open spaces in the area. In doing so they came across defendant Peter Forbes in the marsh grass and had lawful authority to arrest him. An hour or two later they observed defendant Benny Forbes a short distance away dressed in the same heavy clothing and long rubber boots as the men in the house, and they had probable cause to arrest him.

As for the arrests in the house, the persons who brought the marihuana on shore were interrupted by the aircraft and helicopter noise and lights. Defendant Peter Forbes testifying as a defense witness, explained his hiding in the marsh grass by saying he was alarmed by the helicopter and men with shotguns.

Therefore the officers had every reason to believe that suspects were attempting to flee or find some place of refuge. The house on the same premises would be a likely place to look for suspects. As the officers approached they saw that lights were on in the house and persons were moving about inside. Since the trucks and other equipment were already on the premises ready to receive the marihuana, it was obvious that such an operation would not be going on without the participation or acquiescense of the occupants of the house. The officers had probable cause to believe that suspects were in the house. The remaining question is whether a warrant was required.

The government's testimony tends to show that D.E.A. agents Hinchman and Rousseau were given consent to enter the house by an occupant inside. I find that the officers both knocked on the door loudly and identified themselves as federal officers and asked for

permission to enter, and that they heard what they thought was permission to enter from someone inside, and that they entered the house without the use of force. The three defendants testified that the officers did not identify themselves, nor request permission to enter, nor were given permission, but that the officers themselves opened the door and came in. However that may be, it is not necessary to find as a fact whether or not consent was given, since I find that under the circumstances described, exigent circumstances existed to authorize the officers to enter without a warrant. The cases hold that law enforcement officers may not enter a dwelling to effect an arrest unless certain "exigent circumstances" exist which justify a warrantless entry. *Vance v. North Carolina,* 432 F.2d 984 (4th Cir. 1970); *Dorman v. United States,* 435 F.2d 385 (D.C. Cir. 1970); and *U.S. v. Flickinger,* _____ F.2d _____, 23 Cr.L.Rep. 2098 (9th Cir. 1978). The Fourth Circuit in *Vance* adopted the list of exigent circumstances described in Dorman which would justify a warrantless entry in a residence to make an arrest with probable cause. They are: (1) whether a serious offense, particularly a crime of violence, is involved; (2) whether the suspect is reasonably believed to be armed; (3) whether there is a clear showing of probable cause; (4) whether strong reason exists to believe the suspect is in the premises being entered; (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended; (6) whether the entry is forceable or peaceful; and (7) whether the entry is at night.

In the present case we have (1) smuggling twenty tons of marihuana is a serious offense; (2) no evidence of suspects being armed; (3) a clear showing of probable cause; (4) strong reason to believe suspects are in the premises being entered; (5) strong likelihood that sus-

pects will escape if not swiftly apprehended; (6) the entry was peaceful; (7) the entry was before dawn, but persons were up in the house.

Applying the tests set out in *Vance* and *Dorman,* I unhesitatingly find that exigent circumstances existed for the warrantless entry into the house to arrest the three defendants.

With regard to the subsequent searches of the house and the vehicles at the dock, several questions arise. The first search of the house was immediately after the arrest of the three defendants inside, made for the purpose of determining whether there were any other suspects hiding in the house. This precaution has been sanctioned by the Fourth Circuit as a necessary "protective sweep" in *United States v. Baker,* No. 77-1233 (4th Cir. May 25, 1978), and any evidence which comes into view during such a sweep can be seized. Agent Hinchman guarded the house against further searches until late afternoon when a search warrant was obtained. The government contends that it obtained an oral and written consent from Peter Forbes, the lessee of the premises in question, during the middle of the day on February 5. Peter Forbes testified at the hearing that he leased the premises from a Mr. Leonard and that he used the premises for fishing with his son Benjamin Forbes and his (Benny's) friend Richard Jackson. Those two defendants had permission from Peter Forbes to live in the house, and they did so for three or four months prior to February 5. D.E.A. agent Richard Broughton testified that he was at the magistrate's office in New Bern during the day on Februrary 5 in connection with the initial appearances before the magistrate, and while there he saw Peter Forbes and had two conversations with him. He asked Forbes if the officers could search his property

out there and Forbes said "Yes, by all means." Forbes said if there were any drugs down there he wanted them taken off. A few minutes later agent Broughton decided to request a written consent and talked to Mr. Forbes again and asked him if he would sign a written statement giving consent for the officers to search his property, and Forbes said it would be all right. Agent Rousseau wrote a short statement for Mr. Forbes and read it to Mr. Forbes and gave it to him to look at and read. Forbes signed the statement and gave it to Broughton. Agent Otis Rousseau, who was present during the conversation between Broughton and Forbes and who prepared the written statement and talked with Forbes about it, also testified to the same effect as Mr. Broughton concerning Forbes giving his consent. The officers read Forbes his *Miranda* rights before obtaining the oral consent and again before obtaining the written consent.

The defendants contest the validity of the consent to search given by Peter Forbes on the ground that he was seriously ill on February 5 and was not physically or mentally competent to give a valid consent. Testimony was offered by several defendants that Forbes had had several serious illnesses, including partial removal of his stomach a few years earlier, very high blood pressure, and a stroke less than a year earlier; and that he had to take medication daily to control his blood presure and for other purposes. Their testimony tended to show that on February 5 he had had no medication or food all day, and the exertions and stress of the raid and his arrest, sitting on a bench in the cold storage shed for an hour painfully handcuffed from behind, and with no sleep since eight p.m. Saturday night combined to confuse his mind and comprehension of what was going on around him.

Dr. Richard Borden, a physician in general practice in Morehead City, who had treated Peter Forbes, testified concerning his illnesses and the medication prescribed for him. Dr. Borden was asked how the lack of his medications for that period of time would affect him, the doctor replied that the blood pressure medicine would probably have more effect than the others, and he did not think that anybody can say how much time without the medication would be required to effect his blood pressure or brain oxygen appreciably, and it varies with individuals. He said it might take several days or it could be in twelve hours. The doctor was asked several variations of a hypothetical question, but there was never a positive response to any of them.

D.E.A. agent Broughton testified that he had a considerable conversation with Peter Forbes at the magistrate office; that he had known Mr. Forbes' son Benny Forbes from seeing him around the beach when he was growing up in Morehead City; that Broughton felt as if he related to Peter Forbes rather well, because he knew that Forbes was sort of a "country boy" and Broughton considered himself to be one also, having grown up around Morehead. He said that Forbes appeared to be normal to him. He was asked if he thought Forbes was very nervous, and he said no more than any of the others who had been arrested. He did not hear Forbes express any complaints about the treatment he had received. Broughton said that he asked Mr. Forbes if he was feeling all right, knowing that Forbes was about 66 years old, and Forbes said he was doing all right. Agent Rousseau also said that Forbes seemed normal to him, and made no complaints about being ill or about any treatment he had received.

Undoubtedly Peter Forbes had suffered serious illnesses and had very high blood pressure. His age of 66

is only one factor to be considered, and the fact that he undertook to take his boat out to assist in bringing a cargo in from a ship on Saturday night shows that he did not consider himself not to be well physically or mentally, insofar as a person is capable of evaluating that factor in himself. Moreover, it shows that his son Benny Forbes and his friend Richard Jackson considered him to be physically and mentally capable when they went out on the mission, or they would not have gone with him. Perhaps more importantly, all of the defendants who testified that he was frail, trembling, and mentally confused at the time he gave his oral and written consent for the search were also at the magistrate's office waiting in the same area as Peter Forbes when agents Broughton and Rousseau came out to talk with him and took him in the other office. But there was no testimony from any of them that they told the officers about Peter Forbes' condition. His own son should have been the first to tell the officers that he needed his medicine and needed to be given a comfortable place to wait, and was in no condition to be interrogated by the officers.

Dr. Borden was unable to express an opinion in response to the hypothetical question concerning the question whether Peter Forbes could probably have been too mentally confused and lacking in memory to be conscious of what he was doing. On the other hand, agent Broughton's demeanor in relating his conversation with Peter Forbes and the affinity he felt for Forbes impressed me. If Peter Forbes were obviously in physical or mental distress at the time, I believe he would have tried to get some help for him.

Peter Forbes testified that he did not remember signing anything at the magistrate's office, but that he did

have a conversation with agent Rousseau [not by name], and that Rousseau asked him if they could search his place, and Forbes said that it was already searched by daylight this morning, and "as far as I am concerned, go ahead and search it." Peter Forbes also testified that last winter he started fishing again at his place, that he got better and felt better and starting fishing and that is when he leased the place. His testimony at the hearing shows that while he was at the magistrate's office he had enough understanding and memory, to recall at the hearing that he had given his oral consent to a search.

If it were necessary to make a finding as to the competency of Peter Forbes to give his consent to the search, I would find that he was competent to do so. However, in view of the discussion to follow on the matter of the search warrant, it is unnecessary for the purpose of this motion to make such a finding.

As mentioned earlier in this memorandum, after the three defendants were arrested in the house on the Forbes' premises before dawn, the officers made a protective search of the house to determine if any other persons might be hiding in it, and then agent Hinchman secured the house from further search pending the obtaining of a search warrant. From late forenoon until four p.m. Hinchman made a number of telephone calls to the magistrate's office to inquire about the status of the warrant. He had a number of S.B.I. agents waiting around all day to unload the marihuana into the trucks after the search warrant was issued. At four twenty p.m. the magistrate notified Hinchman by telephone that he had issued the search warrant. Thereupon Hinchman went outside where the officers were waiting to do the fingerprinting and to load the trucks, and told them they could commence fingerprinting. A fingerprint

technician asked whether they should not wait until the warrant arrived, and Hinchman told him that that was not necessary and to go ahead. Following that the other officers loaded the marihuana on the trucks, and the officers also made a thorough search of the house, the storage shed and all vehicles on the premises.

Defense counsel contended that the officers began loading the marihuana into the trucks before the search warrant was issued, and as early as three o'clock in the afternoon. S.B.I. agent Isaac Edwards, called by the defense, testified that he was not positive but thought that the loading of the trucks began around three p.m., and was finished around five p.m. On cross-examination he stated that since he was not the agent on the case he did not make any notes and was not looking at his watch or keeping time, and that he was only testifying from his recollection of what happened back in February. S.B.I. agent William Wolak, called by the defense, testified that he was on the premises that afternoon and saw the laboratory technicians come to the premises in the latter portion of the afternoon between three and four o'clock, and that they began processing the vehicles before they started to load the marihuana. On cross-examination Wolak testified that they were standing by waiting to hear when the search warrant was issued, and that the trucks were not processed for fingerprints until the information came that the search warrant had been obtained and they did not start to load the marihuana until after all the vehicles had been processed. Agent Hinchman was in charge and was obviously determined to get a search warrant before conducting the search. The positive and specific testimony given by Hinchman and Wolak outweigh in my mind the uncertain testimony of Isaac Edwards, and I find that the search of the premises, the house, the vehicles,

and the dock area was not commenced until after the search warrant was issued.

The defendants vigorously attacked the validity of the search warrant on grounds that its underlying affidavit does not adequately connect the Back Creek premises to the Lady Ellen smuggling operation; is conclusional and not specific; contains material omissions and inaccuracies; and contains information not within the personal knowledge of the officer making the affidavit. They argue that the affidavit was entirely insufficient to show probable cause for the issuance of the search warrant. The affidavit reads as follows:

> Odis Alexander Rousseau, first being duly sworn, deposes and says:
>
> That at approximately 4:00 AM on February 5, 1978, the vessel Lady Ellen was seized by the U.S. Customs agents after it had been observed by the Customs agents to enter Back Creek from the Atlantic Ocean via Beaufort inlet, up the intercoastal waterway. The ship was further observed by Customs and State agents to dock approximately 10 (10) feet in the inlet of Back Creek where an 18 foot white wooden boat anchored to the Lady Ellen and was loaded with approximately two (2) tons of marijuana and closely thereby was loaded a raft containing several thousand pounds of marijuana.
>
> The Lady Ellen was subsequently seized by Customs agents and contained several more tons of marijuana. Arrested on the premises adjoining the inlet at Back Creek were four individuals one of which identified himself as Richard Jackson. Three of the four people were arrested in the brown and white frame

house located on said premises approximately 1/4 mile off Merriamen Road on Back Creek Road. The house is a one story, four room residence described as brown aluminum with white wooden exterior with a recently constructed storage house and loading platform. See Exhibit A for location of premises on Back Creek Road.

Observed on the premises were several vehicles:

1. Ford truck N.C. AR-3584, white
2. Ford truck N.C. BF-1603, green
3. Ford truck, N.C. ER-3098, white
4. Jeep truck, N.C. DJ-1644, red
5. Chevrolet El Camino, N.C. CR-2328, white/blue
6. Ford model 700, Ga. PF-234, white
7. Ford model 750, N.C. BF-2325, white
8. Chevrolet model C-65, N.C. BE-9456, yellow

Information received from confidential and reliable sources whose information in the past has been proven reliable advised that the marijuana from the Lady Ellen would be off-loaded into several U-Haul type vehicles. These vehicles are believed to contain marijuana, paraphernalia, and instrumentalities to smuggling.

The above information is personally known to this affiant through his personal observation and discussion with those officers personally involved.

The affidavit contains certain inaccuracies. We know from the evidence at the hearing that the affidavit failed to state various facts known by the officers which would

have provided overwhelming support for probable cause, but omissions do not invalidate the warrant if the affidavit nevertheless contains sufficient kernels of fact to show probable cause. The affidavit does show that the Lady Ellen stopped in an inlet of Back Creek where a boat and a raft were alongside, and all three vessels contained large quantities of marihuana. It shows that the Lady Ellen was seen by Customs agents bringing its cargo of marihuana from the Atlantic Ocean into the inland waters of the United States. It shows that on the premises adjoining the inlet at Back Creek were a recently constructed storage house and loading platform, and four trucks and four other vehicles on the premises. The affidavit shows that this occurred one-quarter of a mile off Merriamen Road on Back Creek Road, and at four a.m. on February 5, 1978, which was a Sunday morning. The Drug Enforcement Administration and the Customs Service officers know that marihuana smugglers frequently off-load the marihuana onto small boats to be brought to the shore and loaded into trucks, and that a dock or loading platform is a suitable means of facilitating the operation. While the affidavit does not specifically connect the four men who were arrested with the importation or unloading of the marihuana, it does show that there was reason to believe that some unlawful activity had occurred on the premises, including the house; but that factor is unnecessary to probable cause. The affidavit had attached to it a portion of a map and a hand-drawn sketch which, along with the geographical location given above, adequately describes the location of the premises. The affidavit shows that the premises adjoin the inlet where the Lady Ellen was stopped with quantities of marihuana loaded on the boat and raft alongside. I conclude that the foregoing facts give reasonable grounds to believe that

the premises were being used to facilitate the removal of marihuana which had been imported into the United States unlawfully, and that probable cause existed for a search of the premises and for the issuance of the search warrant.

The next to the last paragraph of the affidavit refering to information from confidential sources is unnecessary to the showing of probable cause and is superfluous. Since it is superfluous, it does not matter that the affidavit does not show the basis of the reliability of the information, or that the vehicles were not U-haul vehicles, although I consider that the trucks were of the kind often used as U-haul trucks. The last sentence stating that the vehicles are believed to contain marihuana and other things was inaccurate, but I consider that to be a mere inadvertence. The last paragraph of the affidavit is not inaccurate, since agent Rousseau did personally know some of the facts, and he did receive reports from other officers personally involved. The evidence does not show whether approximately ten feet in the inlet would describe the location of the Lady Ellen, but that is immaterial. Neither do I recall any evidence about marihuana being on a raft alongside the Lady Ellen, but the evidence did show that one or more small boats were there containing marihuana, and that discrepancy, if any, is immaterial. The search warrant issued upon the affidavit sufficiently describes the premises to be searched and the articles to be searched for. With regard to inaccuracies, the Fourth Circuit in *United States v. Lee,* 540 F.2d 1205 (4th Cir. 1976) stated: "We believe that excluding probative evidence secured on the basis of a materially inaccurate affidavit, where the inaccuracies were innocent or were the result of simple carelessness, would serve no useful purpose.

Only where an officer has committed perjury or has proceeded in reckless disregard of the true facts would we allow an attack on an affidavit sufficient on its face to show probable cause."

Accordingly, I conclude that the affidavit furnished sufficient facts to show probable cause to believe that grounds existed for issuing the warrant and that the search warrant is valid, and all evidence seized as a result of the search is properly admissible.

The defendants also complain that the officers remained in the house after the defendants there were arrested and taken away, and in fact one or more of the officers remained in the house during most of the day, and a number of the officers were coming in and out all during the day to get warm or to discuss the case. They made telephone calls in connection with the progress of the case and used it for a "command post." Defendants contend that the use of the house by the officers constituted a violation of the Third Amendment, providing, "No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." However, the facts as shown by the evidence do not remotely give rise to the type of transgression contemplated by the Third Amendment. See generally *Katy v. U.S.*, 389 U.S. 347 (1967). Furthermore, defendants argue that that conduct constituted a further unlawful intrusion on the privacy of the house, vitiating any consent to enter the house which may have previously been granted. The government's testimony explained the need and reason for the security watch kept in the house pending receipt of the search warrant. Even apart from that, however, no evidence was taken during that period or any other action done which would violate any of defendants'

rights, and no constitutional infringement can be discerned.

Next, the defendants contend that the second seizure of the Lady Ellen and its cargo at Back Creek on February 5 was unlawful. That question was discussed in the court's opinion concerning the Lady Ellen, and reference should be made to that opinion as it applies here. It does not matter that the Coast Guard had convoyed the Lady Ellen to the North Carolina coast, or that the Lady Ellen's crew was navigating it into the United States and into North Carolina waters. I found in that opinion that there was no entrapment by the government or that the officers induced any of the defendants to visit Back Creek that Sunday morning to be caught on board the Lady Ellen or on the premises where the marihuana was found. I said there also that the apprehension of these defendants was not essentially different from arrests made in multitudinous cases where some suspects are arrested and cooperate with the officers by leading them to their confederates. The officers knew from their own knowledge that the Lady Ellen entered the country loaded with marihuana and observed it to its destination, where they apprehended those on board and nearby. The second seizure was entirely valid and the validity of that seizure would not depend upon the validity of the first seizure at sea, but they are entirely separate. Independent and overwhelming probable cause existed for the second seizure of the Lady Ellen, and it was entirely valid.

The defendants made a further argument based upon the evidence showing that during the surveillance of the Lady Ellen as it approached the North Carolina shore and entered its inland waters and as it proceeded toward the Back Creek area, there was cooperation between the

Drug Enforcement Administration and Customs Service on the one hand and the U.S. Marine base at Cherry Point on the other hand in sending radio messages in connection with keeping track of the Lady Ellen, sending information to other law enforcement units, and instructions to agents on the ground. Defendants contend that this was a violation of 18 U.S.Code § 1385, which prohibits the use of the armed forces "as a posse comitatus or otherwise to execute the laws." That negligible participation in routing radio messages does not establish a violation of the statute. *See U.S. v. Redfeather,* 392 F.Supp. 916 (D. S.D. 1975) and *U.S. v. Banks,* 539 F.2d 14 (9th Cir. 1976), *cert. den.,* 429 U.S. 1024.

A final claim made by the defendants, and illustrated by the claim of statutory violation just considered and the claim of quartering of soldiers, is that the government has been guilty of gross misconduct from the initial seizure of the Lady Ellen through the raid at Back Creek, and continuing during the suppression hearings. Defense counsel repeatedly accused the prosecution vehemently of misconduct in various ways, by interfering with their attempted interviews with Coast Guard personnel, not producing documents to which defense counsel were entitled, refusal to furnish discovery, and various other actions. Most of those objections were dealt with during the hearings or by orders entered since then. In lengthy and contested hearings of this magnitude, it is to be expected that friction will occur between opposing counsel. Suffice it to say that the prosecution did not act improperly in any of the instances which was a subject of rulings by the court, and that the record will show that the government cooperated in making discovery available to the defendants and furnishing them information and documents far beyond the

requirements of Rule 16, Federal Rules of Criminal Procedure. I find that the evidence heard did not show any misconduct on the part of the government in carrying out the mission of apprehending the defendants and seizing evidence. The defendants contentions with regard to alleged misconduct are without merit.

We now come to the last question to be determined on these motions, that of standing of the various defendants to challenge the Lady Ellen's second seizure and the various searches and seizures on the premises at Back Creek. The court's discussion of standing in the opinion dealing with the Lady Ellen is applicable here. The standards to show standing are those given in *Brown v. U.S.* 411 U.S. 223 (1976) and the other cases discussed in the Lady Ellen opinion. In order for a person to have standing to contest a search and seizure, the person must (a) be legitimately on the premises at the time of the contested search and seizure; (b) allege a proprietary or possessory interest in the premises; (c) allege a possessory interest in the article seized; or (d) be the victim of a search, the person against whom the search was directed as in *Jones v. U.S.,* 362 U.S. 257 (1960) and *U.S. v. Cobb,* 432 F.2d 716 (4th Cir. 1970).

The defendants Harper, Rowe, Govus, Clark, Black, and Burdine were all arrested on board the Lady Ellen in Back Creek, and they have thereby established standing. The court's Lady Ellen opinion held that the affidavits of proprietary and possessory interests in the Lady Ellen and its cargo by defendants Govus, Jenkins, Burdine and White were ineffective to establish standing for them, and that would apply to these motions also as to any other seizures at Back Creek. None of the other defendants have asserted at the hearing any allegations bringing them within the standing rules set out above.

Therefore no defendants except the six who were on board have standing to contest the second seizure of the Lady Ellen.

As to the searches and seizures at the house, Peter Forbes was the lessee of the house, used it for fishing, and had possessory rights, and he has standing. According to the evidence Benjamin Forbes and Richard Jackson lived there with Peter Forbes' consent and they have standing. Defendants Jenkins and White were legitimately in the house on the invitation of Richard Jackson, who lived there, and they have standing. Defendant Govus testified that he was invited by Benjamin Forbes to stay at the house and keep his clothes and belongings there and that he slept there, and that he owned suitcases and other articles seized, and he therefore has standing. None of the other defendants have standing to challenge the seizures at the house.

Regarding searches and seizures of the premises away from the house, which would include the search of the vehicles near the dock, the storage shed, the dock and surrounding area, including the loading ramp, any boats found there and all marihuana found on the premises, Peter Forbes was the lessee of the premises and as such he has standing. Benjamin Forbes and Richard Jackson lived in the house and used the premises including the shore area for fishing purposes, and they have standing. No one else asserted a proprietary or possessory interest at the hearing in any of the items seized there, and therefore no other defendants have standing to contest the seizures referred to in this paragraph.

Accordingly, based upon all of the foregoing findings of fact and conclusions of law, I recommend that all of these motions to suppress be denied.

This 20th day of June, 1978.

/s/ Logan D. Howell
LOGAN D. HOWELL
UNITED STATES MAGISTRATE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA NEW BERN DIVISION

[Filed July 7, 1978
John R. Whitty, Clerk
U.S. District Court
E. Dist. No. Car.]

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	NO. 78-08-CR-4
	)	
VS.	)	SUPPLEMENTARY MEMO-
	)	RANDUM AND RECOM-
	)	MENDATION ON MOTIONS
DONALD WINSTON HARPER,	)	TO SUPPRESS THE
et al.,	)	SEARCHES AND SEIZURES
	)	AT BACK CREEK
Defendants	)	

The government has filed a Cross Objection to Magistrate's Findings on Motions to Suppress the Searches and Seizures at Back Creek. In its motion the government points out that this court in its original findings and recommendations made certain findings of fact with regard to the entry made by Drug Enforcement Administration Agents Hinchman and Rousseau into the house on the Forbes premises at Back Creek, but refrained from making a finding as to whether the entry was by consent or not, since such a finding appeared unnecessary in view of the court's later finding that "exigent circumstances" authorized the Agents to enter the house for the purpose of searching for and arresting suspects who were attempting to flee the unloading site area. Reference is made to this court's original

memorandum at pages 3 (last paragraph), 4 (top of page), 6, 7 and 8. The government in its motion requested that Judge Dupree direct this court to make an additional finding of fact on the question of a consent entrance into the house, and Judge Dupree has granted the request. Accordingly, the court makes the following additional findings of fact.

With particular regard to the top of page 8 of the original memorandum, I find that DEA Agents Hinchman and Rousseau both knocked loudly on the door to the house and identified themselves as federal officers and asked for permission to enter. A man's voice from inside the front door said, "Come in", or words to that effect. The officers opened the door and went in. Defendants Richard Jackson, David Jenkins and John White were the only persons in the house at the time. Jackson was living in the house with the consent of Peter Forbes, the lessee of the premises, and the other two were legitimately present in the house upon the invitation of Richard Jackson and defendant Benjamin Forbes, the other person who was living in the house with the consent of his father, Peter Forbes. All three of the men were in the front room looking directly at the door. Regardless of whether the permission to enter was voiced by Jackson, who lived there, or by one of the other two defendants, I find that a valid consent to enter was given to the officers.

/s/ Logn D. Howell
LOGAN D. HOWELL
UNITED SATES MAGISTRATE

July 6, 1978.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA NEW BERN DIVISION

[Filed June 22, 1978
John R. Whitty, Clerk
U.S. District Court
E. Dist. No. Car.]

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
DONALD WINSTON HARPER	)	No. 78-08-01-CR-4
MICHAEL BENJAMIN FORBES	)	No. 78-08-02-CR-4
JOHN WHITE,	)	No. 78-08-03-CR-4
a/k/a Leroy J. Edwards,	)	
a/k/a Roy Edwards	)	
DONALD ALFRED BLACK	)	No. 78-08-04-CR-4
HERBERT FRANKLIN CLARK	)	No. 78-08-05-CR-4
DAVID RAY JENKINS	)	No. 78-08-06-CR-4
JAMES MERRILL BURDINE	)	No. 78-08-07-CR-4
RICHARD LEWIS JACKSON	)	No. 78-08-08-CR-4
DAVID RAYMOND GOVUS,	)	No. 78-08-09-CR-4
a/k/a Sam,	)	
a/k/a Melvin Hawkins	)	
PAUL JEROME BRESLIN	)	No. 78-08-10-CR-4
PETER FORBES	)	No. 78-08-11-CR-4
ROBERT McNEILL HERRING	)	No. 78-08-12-CR-4
NEIL WILSON ROWE	)	No. 78-08-13-CR-4
GARY REGAN TALBERT	)	No. 78-08-14-CR-4
	)	

MEMORANDUM AND RECOMMENDATION ON MOTIONS TO SUPPRESS EVIDENCE SEIZED FROM AUTOMOBILES

These are motions by defendants Herring, Talbert, and White to suppress evidence seized as a result of the

stopping of two automobiles by the law enforcement officers on the morning of February 5, 1978 in the vicinity of the marihuana unloading site at Back Creek discussed in the court's opinion on motions relating to Back Creek, which should be referred to for amplification of matters dealt with in this memorandum. The facts will be summarized.

As described in the court's opinion dealing with the searches and seizures at Back Creek, the combined law enforcement agencies commenced a raid on the marihuana unloading site at Back Creek at approximately four a.m. on Sunday morning February 5, 1978. D.E.A. agent Robert Johannesen was in an automobile approaching the Back Creek area as were many other officers, and they were receiving numerous radio messages from the aircraft keeping surveillance on the Lady Ellen, and four Customs patrol boats or intracoastal waterway boats who were also on the waterway trying to observe the Lady Ellen inconspicuously. The messages were directing the officers in automobiles to various positions, and it seemed to Johannesen that the suspects were being pursued all over the area, or that was his impression; and he decided it was time for someone to make an effort to block off the area so that persons near the landing site would not be able to escape. Back Creek road, a dirt road, is the only access road leading from the premises of the landing site to the highway, and the only highway connecting with Back Creek Road is rural paved road No. 1300, running north and south a short distance east of the premises. That road is known as Merriamen Road and it dead-ends to the northward of Back Creek Road. Going southward highway 1300 connects with highway 101, and goes on south to Morehead City. Highway 101 is the highway on which the Core Creek Bridge over the intracoastal waterway is located, and all vessels going northward from Beaufort Inlet to Back Creek must pass under Core Bridge. Highway 1300

is the only highway outlet from the unloading premises in question. The officers knew from what has just been mentioned about traffic under the bridge that the Lady Ellen would have to pass under that bridge before reaching Back Creek, and they knew that somewhere around that bridge would be the most likely spot for the suspects to post a lookout, and hence good police practice would dictate a search for lookouts.

Agent Johannesen received a message advising the agents to watch out for such a lookout, and Johannesen decided that he should attempt to contain the landing site area by setting up a road block on highway 1300. The area along highway 1300 is very flat and sparsely populated. He and S.B.I. agent Paul Bateman went in an automobile south on highway 1300 to a point later determined by another agent to be about one mile from the premises in question, and parked off the road to watch for cars approaching either from the north, which would mean someone leaving the raid site; or from the south, which would be the route any lookout would necessarily follow if he were attempting to return to the raid site. Johannesen explained that it was not a road block, but a checkpoint, as he was not blocking the road, but was pulled off the road without being conspicuous. He established his checkpoint at five forty-five a.m., and remained there an hour and twenty minutes until 7:05 a.m. In that time only two cars came by, the first being a nurse on the way to work, and the second one being driven by defendant Gary Talbert. This was after seven a.m. and already light enough to see well. Talbert was approaching from the south heading north, the route he would follow if he had left Core Creek Bridge. Johannesen backed his car out into the road when Talbert was some distance away; turned on his blue light and waited; Talbert drove up to the checkpoint. Johannesen walked over to the car and asked Talbert for his driver's license and registration, holding

up his own credentials and telling him that he was a federal narcotics agent. Agent Bateman also held up his credentials and announced "Agent Bateman with the S.B.I." Talbert produced his driver's license and the agents asked for the registration, and Talbert told them it was a rental car, and he gave them the rental agreement, which revealed that the card had been rented by a person named Leroy J. Edwards, using the Georgia driver's license with an Atlanta address. The car had been rented from the Raleigh Rent-a-wreck in Raleigh. At that time Johannesen saw a bottle of liquor on the seat in a brown bag. The agent asked him what was in the bag, and the reply was something to the effect that it was liquor or whatever. He was asked what he was doing out at that time of the morning, and he said he was on his way to Nags Head. He was told he was going in the wrong direction, and he said he did not realize that. He was asked why he was going to Nags Head at that time of the year, and he said he was going to buy a hang glider. Then the agent asked if Talbert would mind if they looked in the trunk of his car, and he said no he didn't mind. (Later on cross-examination one of the two agents answered a question which grammatically could be interpreted to mean that Talbert did not give permission, but I am satisfied that the witness did not intend his answer that way, and I find that consent was given.) The officers opened the trunk and found a suitcase in it. They opened the suitcase and found a sum of money in small bills later determined to be $5000.00. Talbert was asked what all the money was for, and he said he was going to buy a hang glider. Then Johannesen went back toward the front of the car and looked in the passenger compartment and saw a radio microphone under the seat. By that time Johannesen had noticed that the seal on the bottle of liquor was broken. Then State A.B.C. Agent Tim Mann arrived on the scene and was told by Johannesen that Talbert had a bottle of whiskey in the automobile with the seal broken, and Mann approached

the car and placed Talbert under arrest for that liquor violation, and took him to the Carteret County Sheriff's Department in Beaufort for processing.

Before Mann actually drove away with Talbert from the scene, defendant Herring approached him in an automobile from the north, which would be the direction taken by anyone leaving the raid site. He stopped at the checkpoint. Since Johannesen had left for the raid site, agent Bateman asked to see his driver's license and registration card which Herring handed to him, and Bateman observed that it was a Georgia license issued to Robert McNeill Herring. Herring did not produce a registration card, but handed over a car rental agreement from the Raleigh Rent-a-wreck Co., issued to Leroy J. Edwards as lessee, the same lessee name and the same rental company as was shown on the rental agreement in Talbert's car. Bateman then asked if he might look in the trunk of Herring's car and permission was given. Nothing was found in the trunk. He was asked where he had been and he said he had been at Atlantic Beach on a hang gliding expedition. Bateman notified Johannesen by radio about the same rental company and the same lessees' name, and at Johannesen's suggestion, Bateman asked Herring if he minded being fingerprinted and photographed at the prisoner processing center at Morehead City. Herring said he did not mind, and at Bateman's request, Herring drove his car to Morehead City behind the agent's car. When they arrived at the processing center Bateman told D.E.A. agent Jiminez that Herring was not under arrest and was there voluntarily. Herring was then arrested and processed.

In addition to the foregoing findings of fact, a stipulation was made between the government and defendant John White establishing the manner in which White was identified by the officers; namely, upon examination of the two rental agreements for the two

automobiles, agent Johannesen went to the Raleigh Rent-a-wreck Company with a photograph display in which John White's photograph was included; when Johannesen showed this display to the manager, he identified White as the person who, using the name of Leroy J. Edwards, rented the two cars driven by Talbert and Herring.

Defendants Talbert and Herring contend that by stopping their cars at the checkpoint the officers violated their Fourth and Fifth Amendment rights by stopping their automobiles and detaining them without probable cause to believe that the drivers' of the vehicles had violated any laws. Defendant White also contends that stopping the two cars was illegal, and that action led directly to his identification as the person who rented the cars, and that his identification is tainted by the illegality of the stopping of the cars. All three defendants accordingly contend that the searches of the cars and the seizures made therein violated their Fourth Amendment rights, and that their detention and subsequent arrests violated their Fifth Amendment rights.

This court must first decide whether or not the vehicles in question were constitutionally stopped. Several Supreme Court doctrines, as delineated in *United States v. Constantine,* 567 F.2d 266 (4th Cir. 1977) and *United States v. Montgomery,* 561 F.2d 875 (D.C. Cir. 1977), are germane here. The Court found in *Terry v. Ohio,* 392 U.S. 1, 21 (1968), that the governmental concern in curtailing crime would permit a police officer, in appropriate circumstances, to approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make the arrest. Subsequently, *United States v. Brignoni-Ponce,* 422 U.S. 873, 881 (1975), held that pro-

bable cause was not required for a brief investigative stop of a car suspected of transporting illegal aliens. The court noted that a reasonable suspicion that the car contained illegal aliens would support such a "minimal intrusion." An officer's stop is "reasonable" if his action was justified at its inception, and if it is reasonably related in scope to the circumstances which justified the interference in the first place. The law enforcement officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry,* 392 U.S. at 19-21 and *see United States v. Bull,* 565 F.2d 869, 870-71 (4th Cir. 1977). In assessing the need for a brief stop, the circumstances with which the officer was faced are not to be dissected and viewed singly; rather they must be considered as a whole. *United States v. Constantine, supra* at 267.

The facts narrated above come logically within the framework of the principle stated in those case. The raid interrupted a large smuggling operation and the evidence indicated that some suspects were dispersing from the scene and that not all of the participants had been arrested. Anyone escaping from Back Creek by car would have to travel on highway 1300, and since it dead-ended to the north, going southward was the only access to main highways. Setting a checkpoint or road block where Johannesen did, that early on Sunday morning in a sparsely populated area was the surest way to intercept any car attempting to escape, and those facts permitted a reasonable inference that anyone traveling along that way would be a likely suspect. Such a rational inference from the facts established reasonably warranted the slight intrusion of stopping the two cars and asking the routine questions related above. Under those cir-

cumstances what was done by the officers was a minimal intrusion on the defendants' Fifth Amendment liberty interests.

The stopping of the cars here was not unlike the circumstances in *United States v. Jackson,* 448 F.2d 963 (9th Cir. 1971). There the Ninth Circuit sanctioned the stopping of a car when the officers had no probable cause to do so, because its occupants were of the same race as two individuals who had recently robbed a liquor store, and the car was proceeding along a logical escape route. The court went on to note that the police are free to use their experience and training in evaluating the circumstances surrounding a proposed stop. *See also Constantine, supra.* Such was the case here; the totality of the circumstances convinces the court that stopping each car that traveled along the only avenue of ingress to and egress from a raid on a large marihuana smuggling operation nearby was justified under these authorities and entirely lawful, and was not a violation of the defendant's Fifth Amendment rights.

The detention of Talbert and Herring by the officers after they were initially stopped, although somewhat protracted, was justified by several factors. First, Talbert produced a Georgia driver's license with an Atlanta address and a car rental agreement in another name, Leroy J. Edwards. The agents had already learned that several of the suspects arrested at Back Creek were residents of Atlanta. His explanation of his whereabouts was somewhat unusual, that of hang gliding, and he was going in the wrong direction to get to his destination, which was at Nags Head. We will overlook the fact that $5000.00 in small bills was found in the suitcasse in the trunk, which matter will be discussed below. The other facts mentioned were suffi-

cient to justify detaining Talbert until A.B.C. officer Tim Mann arrived to arrest him for the liquor violation.

Next, Herring also produced a Georgia driver's license and an Atlanta address, and a car rental agreement identical to the one in Talbert's car and made out in the same name of Leroy J. Edwards. He also gave the same general reason for being in the area, participation in hang gliding. *See U.S. v. Jackson, supra,* at 969-970. Since Talbert was arrested for a liquor violation, there is no need to consider probable cause to arrest him for the other suspected crime, and Herring soon agreed to accompany the officers to Morehead City for photographing and fingerprinting. It was not necessary for the officers to determine whether they had probable cause until after they had reached headquarters and questioned him. The officers who escorted him to Morehead City did not ask him for a statement, but after they arrived there another officer came to Herring's automobile and asked him if he would care to make a statement, and took him over to a police car and took a written statement from Herring. It was after that that he was taken inside and processed. Even then, as said earlier, the escorting officer told D.E.A. agent Jiminez that Herring was not under arrest but had come voluntarily. Nevertheless, agent Bateman believed that Herring was involved shortly after they first talked at the checkpoint. He was asked on cross-examination what he would have done if Herring had stopped following the other car and had gone another way; and the reply was that the officers would have pursued him. It was probably only due to Herring's willing cooperation at the checkpoint and agreeing to follow them to Morehead City that obviated an earlier custodial situation. When he gave the statement at Morehead City, it was a custodial inter-

rogation, and since the evidence does not show that any *Miranda* warnings were given, that statement should be suppressed within the meaning of *Escobedo v. Illinois,* 378 U.S. 478 (1964).

The situation was different earlier at the checkpoint. Both defendants now contend that since they were not given any *Miranda* warnings when they were first stopped, their answers to the officers' questions, the car rental agreements, and information from their driver's licenses should be suppressed. However, the routine inquiries which the officers made when they stopped the defendants did not constitute a custodial interrogation, and there was no requirement to give *Miranda* warnings. *U.S. v. Jones,* 543 F.2d 1171, 1173 (5th Cir. 1976), *cert. den.* 430 U.S. 957 (1977). Even when the defendants left their cars to open the trunks, the *Miranda* warnings were not necessary because the atmosphere surrounding the questioning of each defendant cannot be characterized as coercive. The defendants were cooperating with the officers. *See United States v. Gibson,* 392 F.2d 373 (4th Cir. 1968). The trunk searches were consented to within the meaning of *United States v. Watson,* 423 U.S. 424 (1976) and *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

Finally, defendant Talbert contends that his suitcase, revealed when the trunk was opened, was searched illegally. The government's position is that the search of the suitcase was authorized by Talbert's consent to allow the search of the trunk, and that since the suitcase was in plain view, the contents therein were subject to search and seizure. There was no request for permission to search the suitcase and none was given.

Coolidge v. New Hampshire, 403 U.S. 443 (1971) states the principles relating to a "plain view" search under analogous facts:

> . . . What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, search incident to a lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure. Of course, *the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them;* the "plain view" doctrine may not be used to extend a general exculpatory search from one object to another until something incriminating at last emerges . . . 403 U.S. at 466 (emphasis added).

Even after stopping Talbert and speaking with him and searching the trunk and suitcase, agent Johannesen testified that he had no probable cause to arrest Talbert. Therefore the suitcase and its contents were not "apparently" evidence of a crime at that point. Talbert's arrest for the liquor violation by A.B.C. officer Mann did not occur until after the suitcase was searched and the money seized. In light of those facts, the evidence found in the suitcase should be suppressed. First, the suitcase search was not based upon any probable cause within the meaning of *Cody v. Dombrowski,* 413 U.S. 433

(1973) and *Chambers v. Maroney,* 399 U.S. 42 (1970); nor was it incident to a valid arrest, *see Dombrowski, supra,* and *Coolidge v. New Hampshire, supra* at 455. Although the trunk search was consented to, there was no consent nor probable cause to search the suitcase. *Coolidge* established the proposition that, even if a legally proper search or a consent search is begun, it cannot be extended beyond apparent evidence in plain view in hope that incriminating evidence will be uncovered. The search of the suitcase here was not required by the exigent circumstances usually associatd with plain view searches as discussed in *Coolidge.* Once Talbert was arrested for the liquor violation, or after probable cause had been established, the car and its contents could lawfully have been completely searched within existing case law. Here the search was too soon, and it must fail.

Defendant John White has asserted a claim to standing to challenge the searches and seizures of the two automobiles occupied by Talbert and Herring. Since he was the lessee of both automobiles and since documents seized from each automobile were used to identify him as a defendant in this case, the court finds that he has standing.

Accordingly, based upon all of the foregoing findings of fact and conclusions of law, I recommend that these motions to suppress be denied, except that defendant Talbert's motion to suppress the contents of the suitcase taken from the trunk of the automobile he was occupying be allowed; and I recommend that defendant Herring's motion to suppress the written statement he gave at headquarters in Morehead City be suppressed.

This 22nd day of June, 1978.

/s/ Logan D. Howell
LOGAN D. HOWELL
UNITED STATES MAGISTRATE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
NEW BERN DIVISION

[Filed Jul. 6, 1978
John R. Whitty, Clerk
E. Dist. No. Car.]

UNITED STATES OF AMERICA,	)	
	(	
Plaintiff	)	No. 78-8-CR-4
	)	
VS.	)	
	)	
DONALD W. HARPER, et al.,	)	ORDER
	)	
Defendants	)	

Defendants Herring, Talbert and White have moved to suppress all evidence obtained from the stopping of two automobiles near the raid site at Back Creek in the early hours of February 5, 1978. The Magistrate has recommended denial of the motions. A review of the pertinent portions of the transcript, the memorandum, and the objections persuades the court that the Magistrate is substantially correct.

The stopping of the cars occurred on a rural paved road in a sparsely settled area of the coast at 7:05 a.m. on a Sunday morning. During the hour and twenty minutes before defendant Talbert was stopped, only one car passed through the checkpoint. Additionally, the agents knew that a criminal conspiracy that by its very nature requires large numbers of persons entering and leaving the loading site was in progress, and that the

road on which the checkpoint was set up would necessarily be used in the venture. Accordingly, the agents had a reasonable suspicion that anyone on the road at that particular time might be involved in the criminal activity afoot. Thus the initial stop was justified. *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975). It follows that the officer's questions concerning driver's license, car registration and destination were appropriate, and the answers provided them by defendants Talbert and Herring are admissible.

The DEA customs agent at the checkpoint testified at the motion hearing that none of defendant Talbert's answers to the questions developed probable cause to arrest him. Nonetheless, the officers continued to detain him, and without his consent opened a suitcase found in the trunk and searched his car. This continued action against defendant Talbert was improper. As the Supreme Court stated in a different context about the authority of a law enforcement officer who makes an investigative stop of an automobile based on reasonable suspicion:

> "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *Brignoni-Ponce, supra,* at 881-882.

Thus the items found in the trunk and the car will be suppressed.

Additionally, the Magistrate's conclusion that defendant Herring was never given *Miranda* warnings prior to

an interrogation that was obviously custodial is clearly correct. Thus this statement will also be suppressed.

Accordingly, the Magistrate's recommendation is accepted with the modifications explained above as to defendant Talbert. The motions to suppress are denied in part and allowed in part.

SO ORDERED.

/s/ F.T. Dupree, Jr.
F.T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

July 5, 1978

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
NEW BERN DIVISION

[Filed _____ 1978
John R. Whitty, Clerk
U.S. District Court
E. Dist. No. Car.]

No. 78-08-01-CR-4
No. 78-08-02-CR-4
No. 78-08-03-CR-4
No. 78-08-04-CR-4
No. 78-08-05-CR-4
No. 78-08-06-CR-4
No. 78-08-07-CR-4
No. 78-08-08-CR-4
No. 78-08-09-CR-4
No. 78-08-10-CR-4
No. 78-08-11-CR-4
No. 78-08-12-CR-4
No. 78-08-13-CR-4
No. 78-08-14-CR-4

UNITED STATES OF AMERICA	:	
	:	
v.	:	STIPULATION
	:	
DONALD WINSTON HARPER	:	
MICHAEL BENJAMIN FORBES	:	
JOHN WHITE,	:	
a/k/a Leroy J. Edwards,	:	
a/k/a Roy Edwards	:	

DONALD ALFRED BLACK :
HERBERT FRANKLIN CLARK :
DAVID RAY JENKINS :
JAMES MERRILL BURDINE :
RICHARD LEWIS JACKSON :
DAVID RAYMOND GOVUS, :
a/k/a Sam, :
a/k/a Melvin Hawkins :
PAUL JEROME BRESLIN :
PETER FORBES :
ROBERT McNEILL HERRING :
NEIL WILSON ROWE :
GARY REGAN TALBERT :

In his Memorandum and Recommendation on Motions to Suppress Evidence Seized From Automobiles, the Magistrate apparently found on Page Three that the defendant Talbert displayed a Georgia driver's license when he was stopped by Robert W. Johannesen on February 5, 1978. In order to avoid any confusion, the United States stipulates and agrees that the defendant Talbert displayed a North Carolina driver's license when he was stopped by Robert W. Johannesen on February 5, 1978.

This the 2nd day of July, 1978.

/s/ Herman E. Gaskins, Jr.
HERMAN E. GASKINS, JR.
Assistant United States Attorney

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA NEW BERN DIVISION

[Filed June 14, 1978
John R. Whitty, Clerk
U.S. District Court
E. Dist. No. Car.]

UNITED STATES OF AMERICA	)	MEMORANDUM AND RECOMMENDATION ON MOTIONS TO SUPPRESS STATEMENTS OF DEFENDANTS HARPER AND ROWE
v.	)	
DONALD WINSTON HARPER	)	No. 78-08-01-CR-4
MICHAEL BENJAMIN FORBES	)	No. 78-08-02-CR-4
JOHN WHITE, a/k/a Leroy J. Edwards, a/k/a Roy Edwards	)	No. 78-08-03-CR-4
DONALD ALFRED BLACK	)	No. 78-08-04-CR-4
HERBERT FRANKLIN CLARK	)	No. 78-08-05-CR-4
DAVID RAY JENKINS	)	No. 78-08-06-CR-4
JAMES MERRILL BURDINE	)	No. 78-08-07-CR-4
RICHARD LEWIS JACKSON	)	No. 78-08-08-CR-4
DAVID RAYMOND GOVUS, a/k/a Sam, a/k/a Melvin Hawkins	)	No. 78-08-09-CR-4
PAUL JEROME BRESLIN	)	No. 78-08-10-CR-4
PETER FORBES	)	No. 78-08-11-CR-4
ROBERT McNEILL HERRING	)	No. 78-08-12-CR-4
NEIL WILSON ROWE	)	No. 78-08-13-CR-4
GARY REGAN TALBERT	)	No. 78-08-14-CR-4

Defendants Donald Harper and Neil Rowe have filed motions for the suppression of all statements given by them to law enforcement officers after the boarding of the Lady Ellen and during their stay on board the Alert.

Defendants assert several grounds for the motion. They first contend that the statements given resulted from an unlawful stopping and boarding of the Lady Ellen in violation of their constitutional rights, and that all statements given thereafter were tainted by the original violation. They also contend that the statements were not made pursuant to a valid waiver of their Fifth Amendment privilege against self-incrimination under the standards of *Miranda v. Arizona,* 384 U.S. 436 (1966); they further contend that the statements were produced by duress, consisting of alleged oppressive treatment and the conditions of their confinement on both vessels, and by promises of benefits in return for their cooperation made by several of the officers who questioned them; and that the statements were obtained during their unlawful confinement and detention continued in violation of their right to be taken before a magistrate without unnecessary delay, as provided in Rule 5, Federal Rules of Criminal Procedure.

The defendants' first argument, that the Lady Ellen was boarded illegally, was decided adversely to the defendants in this court's separate opinion dealing with that issue, and that first ground does not lend any support to this motion. Going next to their argument alleging a violation of their *Miranda* rights, the evidence clearly shows that the officers from the Coast Guard Cutter Alert informed Harper and Rowe of their *Miranda* rights several times during the time in question, beginning with the boarding of the Lady Ellen. When Lieutenant Commander White asked the master, defendant Breslin, the routine questions concerning where the ship had come from and what was its destination, and Breslin answered that the ship was from Columbia and was loaded with marihuana, Mr. White immediately

caused the three defendants to be mustered at the fantail and Ensign Olthuis read them their *Miranda* rights from the card he carried with him, and each defendant acknowledged that he understood his rights read from the card. No statements were made by any of the defendants while on board the Lady Ellen, but there was some discussion of the possibility of the defendants cooperating by participating in a controlled delivery of the marihuana, the subject first being introduced by Mr. White in the meeting at the fantail. There was no decision made by anyone at that time about the controlled delivery, but Breslin expressed some interest in the idea.

The next morning, January 27, the three defendants were transported to the Cutter Alert, and were promptly read their *Miranda* rights again in the presence of ship's officers Perez and Willis. They were then routinely processed as prisoners and were given breakfast. Then U.S. Customs Agent Fernando Martinez again informed them of their rights, this time by handing each defendant a *Miranda* warning card including a form of waiver at the bottom. Agent Martinez asked Harper and Rowe to read the card and the waiver form underneath stating that they had read their rights and understood them and waived them voluntarily. Both defendants signed their individual waiver forms and said they understood their rights. In their testimony at the hearing Harper testified that he had difficulty reading the card, and Rowe testified that his was not dated when he signed it; but both acknowledged that they understood their rights and did sign the waivers.

Harper and Rowe both gave statements at that time, which were recorded by Lieutenant Perez, typed, and signed by Harper and Rowe and witnessed by the officers.

Later that day, January 27, Drug Enforcement Administration Agent Felix Jimenez was flown aboard the Alert by helicopter from San Juan, Puerto Rico to advise the Coast Guard officers concerning the planning and execution of a controlled delivery and to direct those efforts. He interrogated Harper and Rowe that evening, after informing them of their *Miranda* rights. His interrogation of Harper and Rowe, as well as defendant Breslin, was conducted at intervals over a period of several days aboard the Alert. He talked to them sometimes together and sometimes separately, but his conversation was mostly with Breslin, who was the master of the Lady Ellen and assumed a role of leadership for the others. Breslin gave a lengthy statement in his own handwriting relating the entire history of the transactions involving the Lady Ellen.

It is clear from the foregoing that the officers on the Alert were intent upon advising Harper and Rowe of their *Miranda* rights upon every appropriate occasion prior to a new interrogation or a change in their circircumstances such as their removal from the Lady Ellen to the Alert, the appearance of customs agent Martinez and his interrogation, and the arrival of D.E.A. agent Jimenez and the beginning of his interrogation of them. Harper and Rowe of course are pressing two other grounds for suppressing their statements, to be dealt with next, but I find on the second ground that Harper and Rowe were fully advised of their *Miranda* rights prior to the commencement of each interrogation of them by the officers and before any statements were made. They did not contend in their testimony that they were not advised of their rights or that they did not understand them, nor did they testify that they ever requested that any interrogation be discontinued, or requested the assistance of an attorney before answering

any further questions. The fact that the interrogation by agent Jimenez continued at different times over several days does not impair the effectiveness of their acknowledgment that they understood their rights and their written waiver of rights. They simply never objected to questioning or attempted to invoke their rights. I therefore find that Harper and Rowe made a valid waiver of their Fifth Amendment privilege against self-incrimination under the standards of *Miranda v. Arizona, supra.*

For the sake of simplicity the claim of duress because of conditions of confinement will be treated separately first, and the alleged promises of benefits and the claim of prolonged confinement in violation of Rule 5 will be combined and discussed last. The defendants testified and contend that they were confined on the Lady Ellen overnight under intolerable conditions, in that they were forced to spend the night cramped in a few feet of space on the deck of the mess area, and could hardly sleep at all, being under armed guard. They made the same contentions as to treatment on board the Alert: that much of their time had to be spent in the crew's area, which was the busiest place on the ship, with continual traffic back and forth for most of the twenty-four hours of the day, doors banging all through the night, people constantly coming to the area to get food before and after watches, and other discomforts, and that they were given nothing but thin pads to sleep on, and someone took their blankets one night; that it was too hot at the beginning of the voyage and became too cold in the northern latitudes. They conceded in testimony that they were treated courteously by the crew and officers, that they ate the same food as the crew, that they were allowed to go around the ship accompanied by a guard when they wished. Harper testified that he was treated

considerately by Lieutenant Commander White on the Lady Ellen and by the crew on the Alert, that he felt no fear, and was confident that the Coast Guard would take care of him. Altogether, I find that the conditions they experienced, except for not having a bunk to sleep in, were not noticeably more rigorous or uncomfortable than the conditions experienced by seamen on small vessels at sea in rough weather on many voyages. In fact, the ship's air-conditioning was out of order, and some of the officers were sleeping on deck and under life boats in an effort to keep cool. I find that they were treated with due consideration and were accommodated as comfortably as was feasible under the crowded conditions and the fact that they did have to be guarded. I find that the conditions of their confinement were not unreasonable and did not constitute oppressive treatment or duress which could have affected the voluntariness of any statements made by them.

The final grounds asserted involved alleged promises made to them concerning the treatment they would receive if they cooperated in a controlled delivery, and their alleged detention in violation of Rule 5. The subject of a controlled delivery of the marihuana to its originally intended destination, in which the three defendants on the Lady Ellen would be invited to participate, was discussed on the Lady Ellen immediately after the three were confronted by Lieutenant Commander White at the fantail. Mr. White may have first introduced the subject, and Breslin was interested in it. Harper and Rowe heard the discussion but contend that they were not asked to participate and that they certainly did not agree, which they say remained their attitude from then until the day before they reached the North Carolina coast. On board the Alert from January 27 until that last day, a controlled delivery was a principal subject of

discussion between agents Martinez and Jimenez and the three defendants, but mostly between the officers and Breslin. The officers spent much more time talking and planning with Breslin than with the others.

The sole purpose of D.E.A. agent Jimenez in boarding the Alert and dealing with the defendants was to plan and direct a controlled delivery with the participation of the defendants. He and Martinez testified a number of times about their discussions with the defendants as to whether or not they wished to participate in the controlled delivery and they finally said they did. Certain decisions which had to be made before a controlled delivery could be undertaken were whether these defendants wanted to be taken before a magistrate in Puerto Rico first and then participate in the controlled delivery, or whether they wanted to waive an immediate appearance in Puerto Rico and make the delivery, or whether they preferred to refuse the controlled delivery and be taken promptly before a United States Magistrate at San Juan, Puerto Rico for an initial appearance as required by Rule 5, and for trial. Martinez and Jimenez told of several discussions with all of the defendants of the risks involved in their going ashore in a controlled delivery, which could expose their lives to danger when their cooperation became evident. This was a matter of great concern to both officers, and they testified that they emphasized this risk to Harper and Rowe and were greatly concerned about the risk of danger to them. Both officers testified that on several occasions they informed each of the three defendants together and separately of their right to be taken before the nearest magistrate without unnecessary delay, which would be at San Juan, Puerto Rico. With regard to any promises made to them to induce them to participate, Mr. White testified that one of the first things he said to

them on the Lady Ellen was that he could promise them nothing if they participated. Defendants have not disputed that. Martinez and Jimenez testified that they made no promises whatsoever to them about the treatment or punishment they might receive in return for participating, except for the well known fact that such cooperation is normally taken into consideration by judges who might have the duty of imposing sentences upon them. Harper and Rowe testified and contend that Martinez and Jimenez both told them several times that if they chose to be taken to Puerto Rico for an appearance before a magistrate, and to be tried in Puerto Rico, they might want to consider the severe treatment and maximum sentences which were being imposed in Puerto Rico for marihuana smuggling offenses. The defendants testified that the officers mentioned bail of one million dollars and ten-year sentences.

Another factor involved which Martinez and especially Jimenez explained to Harper and Rowe was that if they wanted to participate in the controlled delivery but also wanted to avail themselves of their privilege and right to be taken promptly before a magistrate in San Juan, Puerto Rico, there would be an appreciable risk that the appearance before a magistrate in San Juan would become known, and word would reach others involved in the scheme, and their lives would then be exposed to danger if they continued with the controlled delivery. The mere disclosure that they had been captured would be sufficient to create serious risk of harm to them. Furthermore, for defendants to make the appearance in San Juan would create a serious risk of disclosure which would jeopardize the sucess of the controlled delivery itself.

On January 27, with the defendants aboard the Alert, the cutter was required to steam northeasterly toward

Puerto Rico in order to approach close enough for the helicopter to transport Jimenez to the Alert. That was the closest approach to San Juan, and the decision about an appearance before the magistrate had to be made fairly soon. Martinez and Jimenez testified that after they explained to Harper and Rowe their right to go before a magistrate in Puerto Rico, the officers also explained that they could waive that right and continue on a course for North Carolina to make the controlled delivery, and the officers testified that Harper and Rowe both orally waived their rights under Rule 5 in favor of cooperating with the controlled delivery. Harper and Rowe strenuously disputed that, testifying that no one explained to them their right to be taken before the nearest magistrate without unnecessary delay and that no one discussed with them the matter of their giving up that right in order to proceed upon the controlled delivery mission; at least not until after Jimenez arrived and began interrogating them. After stating several times in their testimony that no one ever spoke to them about their right to see a magistrate or about their waiving such right, Harper testified that it was after the second interrogation by Jimenez that those questions were discussed; and his testimony was that Breslin came out of a meeting with Jimenez and said that Jimenez was "leaning on him" to cooperate, and was telling Breslin that if he did not cooperate he would be taken to Puerto Rico where bond would probably be set at a million dollars. Harper and Rowe never testified that they specifically agreed to cooperate with the controlled delivery or agreed orally to waive their right to be taken before a magistrate at San Juan. On the other hand, Harper testified that as early as the Martinez interview with them on the morning of January 27 Martinez was telling them about the harsh sentences imposed and high

bail required of marihuana smugglers who elected to go to Puerto Rico for appearance before a magistrate and for trial, and also testified that Jimenez was telling them the same things during his discussions with them. Obviously, the matters of high bail and harsh sentences in Puerto Rico could not have entered the discussions unless someone had mentioned their right to see a magistrate in Puerto Rico as an alternative to continuing on the controlled delivery, and that "someone" must have been the officers, since Harper and Rowe were saying that they knew nothing about the subject. It defies belief that the Coast Guard would have steamed to North Carolina to execute a controlled delivery of marihuana without the voluntary cooperation of Harper and Rowe. In determining the question of creditability on the evidence, I have to consider also their testimony that no one explained the *Miranda* waiver forms to them; but at other points they testified that they understood their rights and that they read and understood the waiver form. Obvious contradictions appear from their denials of any conversations about controlled delivery or a magistrate appearance in Puerto Rico, along with testimony about the harsh treatment in Puerto Rico and Breslin's suggestion that they go along. Related to the matters just discussed is their testimony that since Breslin was the master of the Lady Ellen and their commanding officer, they were under his complete influence, looked to him for all decisions affecting their post-capture decisions and considered him their captain even until after the final arrests in Carteret County where they were taken for processing to the Fisheries Resources Department Building in Morehead City. It is not credible that Harper or Rowe continued to consider Breslin as their captain after he was removed from the Lady Ellen, arrested and confined; or that their minds

and wills could be dominated by Breslin to the extent that crucial decisions affecting their liberty and lives — their agreement to cooperate and agreement to waive their right to a magistrate appearance in Puerto Rico — were not their own voluntary decisions. That is especially so in the case of Harper, who testified that he was much older than Breslin and had been at sea for thirty years. Neither defendant offered any testimony that they were compelled or coerced into going back aboard the Lady Ellen to proceed to North Carolina for the controlled delivery or that they ever requested that the voyage to North Carolina or the entrance at Beaufort Inlet be discontinued or that they be taken off the Lady Ellen or that the controlled delivery be discontinued. Neither did they testify that they requested to be taken before a magistrate at San Juan, or objected when the Alert continued toward North Carolina without stopping at San Juan.

Therefore, upon all the evidence relating to the third and fourth grounds for the motion, I find that the treatment of Harper and Rowe and the conditions of their confinement on board both vessels were reasonable under the circumstances and did not affect the voluntariness of statements made by them. I further find that even if the officers made the statements about the sentences imposed and bail required in Puerto Rico in comparison with treatment which might be expected in the United States, as alleged by the defendants, such statements could not constitute threats or promises or coercion which could have caused Harper and Rowe to agree to cooperate or agree to waive their right to see a magistrate in Puerto Rico without unnecessary delay. There were no promises made, because neither Harper nor Rowe testified that any promises were made, only the suggestions of harsh treatment in Puerto Rico. The

ten-year sentences mentioned in their testimony would be no more than the maximum penalty for two counts in a smuggling indictment, such as the one in this case, and every citizen of the age and experience of these defendants is aware of the fact that attorneys are appointed for defendants and that courts entertain motions for modification of unreasonable bonds. I further find that Harper and Rowe each orally waived their right to be taken before the nearest magistrate without unnecessary delay and orally agreed to participate in the controlled drop, and that those decisions were voluntarily and intelligently made.

The finding just made that the two defendants voluntarily waived their right to appear before the nearest magistrate at San Juan without unnecessary delay is not the only basis for denying the motion to suppress on that ground. The mere fact that a delay occurs between the time of arrest and the time a prisoner is taken before a magistrate does not of itself constitute a violation of Rule 5. The Supreme Court said in *Mallory v. United States,* 354 U.S. 449, 455 (1956), "The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience." On the morning of January 27 when the defendants were taken aboard the Alert, the nearest federal magistrate was at San Juan, Puerto Rico, less than a day's journey for the Alert. In fact, the Alert had to steam toward Puerto Rico to get within helicopter range of San Juan in order for agent Jimenez to be brought aboard. The Coast Guard would not have requested the Drug Enforcement Administration to send Jimenez to the ship unless the prospects for a controlled delivery appeared promising. I have found that Harper and Rowe made their final decision to cooperate in the delivery probably on the next day,

January 28. Both Martinez and Jimenez had explained to the defendants their right to be taken before a magistrate at Puerto Rico. For purposes of the present discussion we can disregard the previous finding that Harper and Rowe orally waived an appearance in San Juan. As stated above, officers understood the risks involved in stopping at San Juan for an appearance before the magistrate and then continuing on the delivery — the risk of placing defendants' lives in danger, and causing the failure of the controlled delivery, in which case the only result would be danger to the defendants. Even a rumor of their presence on the island might reach associates in the smuggling operation, and an appearance before the magistrate would involve an appreciable risk of publicity, although defense counsel contended that it is possible to conduct such proceedings without publicity. At any rate, the Coast Guard considered that the above factors established sufficient justification for the decision not to take the defendants before a magistrate in Puerto Rico [again disregarding the waiver].

Somewhat similar circumstances were held by the Fifth Circuit not to constitute an illegal detention and unnecessary delay in presenting a prisoner before a federal magistrate in *United States v. Odom,* 526 F.2d 339 (5th Cir. 1976). In that case there was no practical alternative choice of going to a relatively nearby magistrate or proceeding to the coast on the controlled delivery, as in our case. There the Coast Guard cutter was on routine patrol in the Yucatan Straits between Cuba and Mexico, one of the three routes for smuggling marihuana from Colombia to the United States (the Mona Passage used by the Lady Ellen being one of the others). When the Coast Guard cutter stopped and boarded Odom's vessel it was two hundred miles from

its intended destination for the marihuana at Tampa, Florida, and it was five days before the cutter reached Tampa and Odom was taken before a magistrate. The decision of the Fifth Circuit, however, is a clear holding that flexibility is to be used in interpreting the requirements of Rule 5. The court stated the principle as follows:

> Certainly, delay prior to arraignment is a factor that must be considered in determining voluntariness, but such delay must be 'unnecessary' before it will render a confession inadmissible. *Mallory v. United States,* 354 U.S. 449 . . . (1966). Odom contends that he and his crew were unreasonably detained aboard the 'Valiant' in order to facilitate the Drug Enforcement Administration's plan to arrest the other people involved in the conspiracy. It is true that the United States Supreme Court expressly condemned delaying arraignment by arresting officers when the only reason for such delay is to give them an opportunity to extract a confession from the defendant, but the court also recognized that certain circumstances may justify a delay between arrest and arraignment. Also, this court has stated that although Congress established six hours as a minimum period which would pass muster, a longer delay merely constitutes another factor to be considered by the trial judge in determining voluntariness. *United States v. Hathorn,* 451 F.2d 1337, 1341 (5th Cir. 1971). (footnotes omitted) (526 F.2d at 343.)

The Fifth Circuit case of *United States v. Hathorn,* cited in the quotation just above, is even stronger authority for the government's position on this question,

since there the prisoner was kept in custody for five days after his confession when magistrates were closely available. The court said "No reason appears in the record for this delay. We conclude that the period between confession and arraignment is, like the period between arrest and confession, no more than an additional factor that the trial judge should consider in his determination of voluntariness." The court stated its agreement with the Ninth Circuit opinion in *United States v. Halbert,* 436 F.2d 1226 (9th Cir. 1970). The Ninth Circuit there held that the purpose of Congress in enacting 18 U.S.C. § 3501 and its six-hour provision was to ameliorate the effect of the decision in *Mallory v. United States, supra,* and "to remove delay alone as a cause for rejecting admission into evidence of a confession and to make the voluntary character of the confession, the real test of its admissibility."

I find from all of the evidence in this hearing that the only statements taken from defendants Harper and Rowe were made, signed and witnessed on board the Alert on January 27, 1978 less than twenty-four hours after they were taken into custody on the Lady Ellen. The only discussions the officers had with Harper and Rowe thereafter during the voyage were for the purpose of ascertaining their decisions regarding their participation in the controlled delivery and extensive discussions between the officers and the defendants in planning the controlled delivery. All three participated, but the officers dealt principally with Breslin, the others being called in from time to time as necessary, and of course they had to know what they were to do. Those planning discussions were not for the purpose of extracting any confessions from Harper and Rowe. The only delay between January 27 and the time of their appearance before a magistrate in New Bern was caused initially by

the time required for Harper and Rowe to make their decisions, and afterwards due to travel time necessary to reach North Carolina and execute the controlled delivery. I conclude therefore that under the authorities referred to above such delay was not for the purpose of further interrogation of the defendants or for the purpose of evading the requirements of Rule 5 and was not "unnecessary delay" within the meaning of Rule 5. Such delay does not constitute a violation of Rule 5 or grounds for suppressing the statements of Harper and Rowe which are at issue.

Accordingly, I recommend that the defendants' motions to suppress their statements be denied.

This 14th day of June, 1978.

/s/ Logan D. Howell

LOGAN D. HOWELL,
United States Magistrate

APPENDIX K

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1 of the United States Constitution provides as follows:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment to the United States Constitution provides in part as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATUTORY PROVISIONS INVOLVED

14 U.S.C. section 89 provides as follows:

"(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if neccessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

"(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

"(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

"(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

"(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States."

14 U.S.C. section 143 provides as follows:

"Commissioned, warrant and petty officers of the Coast Guard are deemed to be officers of the customs and when so acting shall insofar as performance of the duties relating to customs are concerned, be subject to regulations issued by the Secretary of the Treasury governing officers of the customs."

The Federal Magistrates Act, 28 U.S.C. section 636, provides in part as follows:

"(b) (1) Notwithstanding any provision of law to the contrary ---

"(A) a judge may designate a magistrate to hear and determine any pretrial matter pend-

ing before the court, except a motion . . . to suppress evidence in a criminal case . . . .

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) . . . .

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

The Jury Selection and Service Act of 1968, 28 U.S.C. sections 1861, 1862, 1863(a), 1863(b)(2) and (3), and 1867(a), provides in relevant part as follows:

"§ 1861. Declaration of policy

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury

shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

§ 1862. Discrimination prohited

"No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

"§ 1862. Plan for random jury selection

"(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title . . . .

"(b) Among other things, such plan shall ---

". . .

"(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the

lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. . . ."

"(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division where in the court convenes. . . .

"§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury . . . ."

REGULATORY PROVISIONS INVOLVED

19 C.F.R. section 162.3(a) (1977) provides as follows:

"A customs officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board: . . .

"(2) Any American vessel on the high seas, when there is probable cause to believe that such vessel is violating or has violated the laws of the United States . . . ."

APPENDIX L
TABLE OF DISPARITIES IN COMPOSITION OF PETITIONER'S JURIES

Wheel and Affected Class	Data		Standards of Representativeness			
	Proportion of Population (%) (% labor force for occupation)	Proportion of Qualified wheel (%)	Absolute Disparity (%)	Comparative Disparity (%)	Statistical Significance Test	
					Probability of Chance < 1 in	Equivalent in Std. Deviations >
GRAND JURY						
Blacks	30.2	20.0	−10.2	−33.8	100,000	4
Professionals & Managers	19.7	44.5	+24.8	+125.9	100,000	4
Blue-collar & Service Workers	51.1	28.0	−23.1	− 45.2	100,000	4
No College	83.9	56.8	+27.1	− 32.3	100,000	4
Some College	16.1	43.2	+27.1	+168.3	100,000	4
PETIT JURY						
Blacks	27.8	16.1	−11.7	− 42.1	1,000	3
Professionals & Managers	19.4	54.5	+35.1	+180.9	100,000	4
Blue-collar & Service Workers	50.6	24.1	−26.5	− 52.4	100,000	4
No College	84.2	58.3	−25.9	− 30.8	100,000	4
Some College	15.8	41.7	+25.9	+163.9	100,000	4

* The source for this data is an offer of proof made by petitioner Herring but refused by the Court. Essentially the same data was later admitted by the Court in *United States v. Coats*, 611 F.2d 37 (4th Cir. 1979), cert. den., No. 79-1230.

APPENDIX M
TABLE OF OUTCOMES OF JURY COMPOSITION CHALLENGES

Case		Percent Affected Class In		Percent Disparity		Challenge Successful?
Citation	Affected Class	Population	Wheel	Absolute	Comparative	
Swain v. Alabama, 380 U.S. 202 (1965) (10% construction)	Blacks	26	16	10	38	no
Same (16% construction)	Blacks	26	10	16	62	no
Jones v. Georgia, 389 U.S. 24 (1967)	Blacks	19.1	5.0	14.7	75	yes
Castaneda v. Partida, 430 U.S. 482, n.8 (1977)	Spanish Surnamed	65	39	26	40	yes
Stephens v. Cox, 449 F.2d 657 (4th Cir. 1971)	Blacks	34	15.7	18.3	53.8	yes
Preston v. Mandeville, 428 F.2d 1392 (5th Cir. 1970)	Blacks	29	16	13	45	yes
Porter v. Freeman, 577 F.2d 329 (5th Cir. 1978) (initially)	Blacks	53.8	33.4	20.4	37.9	yes
Same (after corrective refiling)	Blacks	53.8	45.0	8.8	16.3	yes
This case (grand jury)	Blacks	30.2	20.0	10.2	33.8	no
This case (petit jury)	Blacks	27.8	16.1	11.7	42.1	no

Case		Percent Affected Class In		Percent Disparity		Challenge Successful?
Citation	Affected Class	Population	Wheel	Absolute	Comparative	
U.S. v. Grant, 475 F.2d 581 (4th Cir. 1973) (grand jury - 31.9 % construction)	Blacks	31.9	21.9	10.0	31.3	no
Same (34.8% construction)	Blacks	34.8	21.9	12.9	37.1	no
U.S. v. Maskeny, 609 F.2d 183 (5th Cir. 1980) (grand jury)	Blacks	29	20	9	31	no
Duren v. Missouri, 439 U.S. 357 (1979) (summoned)	Women	54	26.7	27.3	50.1	yes
U.S. v. DiTommaso, 405 F.2d 385 (4th Cir. 1968)	Women	52.1	29	23.1	44.3	no
Same	Blue-collar (% labor force)	29.3	18.6	10.7	36.5	no
This case (petit jury)	Blue-collar & Service workers	50.6	24.1	26.5	52.4	no
This case (petit jury)	No college	84.2	58.3	25.9	30.8	no

Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR.

No. 79-1863

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD WINSTON HARPER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the suspicionless Coast Guard boarding of an American vessel on the high seas violated petitioners' Fourth Amendment rights.

2. Whether the confessions of petitioners Harper and Rowe were voluntary.

3. Whether the actions of government agents in stopping automobiles driven by petitioners Talbert and Herring violated their Fourth Amendment rights.

4. Whether voice identification testimony admitted against petitioner Forbes was the fruit of an unlawful arrest.

5. Whether petitioners were improperly deprived of de novo consideration by the district court of the magistrate's recommendations on the suppression motions.

6. Whether the evidence was sufficient to support petitioners' convictions for conspiracy to import marijuana.

7. Whether the jury selection plan of the United States District Court for the Eastern District of North Carolina deprived petitioner Herring of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968 or the Constitution.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 617 F. 2d 35.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1980. A petition for rehearing was denied on March 26, 1980. The Chief Justice extended the time for filing a petition for a writ of certiorari to May 24, 1980, and the petition was filed on May 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of North Carolina, petitioners were convicted of conspiring to import marijuana into the United States, in violation of 21 U.S.C. 963. Petitioners Talbert, Herring, Burdine, and Jackson were each sentenced to three years' imprisonment; petitioner Jackson was also fined $5,000. Petitioners Jenkins, Black, and White were each sentenced to five years' imprisonment, all but six months of which was suspended, and were placed on probation for five years. Petitioners Rowe and Harper were each sentenced to five years' imprisonment, all of which was suspended in favor of five years' probation; in addition, they were each fined $4,000. Petitioner Forbes was sentenced to four years' imprisonment and a $10,000 fine. Petitioner Govus was sentenced to five years' imprisonment and a $15,000 fine. In addition, all petitioners received a two-year special parole term.[1] The court of appeals affirmed (Pet. App. 1a-14a).

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[1]Petitioners have not challenged their special parole terms. However, in *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980),

The evidence is recounted in the opinion of the court of appeals and in the magistrate's recommendations on the motions to suppress (Pet. App. 3a-4a, 10a-12a, 19a-21a, 53a-58a, 82a-86a). It showed that in January 1978 the United States Coast Guard was engaged in patrolling the Carribean sea lanes for general law enforcement purposes, with a special emphasis on drug interdiction. On January 25, the Coast Guard cutter ALERT spotted the LADY ELLEN, a fishing vessel of North Carolina registry, in the Mona Passage between the Dominican Republic and Puerto Rico. Following its policy of stopping all United States vessels in the region less than 250 feet in length, the crew of the ALERT stopped and boarded the LADY ELLEN and inquired of its captain the vessel's destination and point of embarkation. The captain responded, "You got me, I'm coming from Colombia and I have a load of marijuana on board." The captain and his crew, consisting of petitioners Rowe and Harper, were immediately arrested. A search of the vessel uncovered approximately 25 tons of marijuana.

Thereafter, the crew agreed to cooperate in a controlled delivery of the marijuana to their co-conspirators in North Carolina. At Morehead City, North Carolina, the LADY ELLEN, while under continuous surveillance, picked up a man, later identified as petitioner Forbes, who took over its navigation to the landing site. As it approached the site, customs officers in patrol boats, who had been following the LADY ELLEN, observed an off-white or beige 1970 or 1972 model Plymouth or Dodge on the bank at a bridge. The headlights of the automobile

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this Court recently held that a special parole term may not be imposed as part of a sentence for narcotics conspiracy. Petitioners may move for correction of their sentences in the district court under Rule 35, Fed. R. Crim. P.

were turned on the boats as they passed. Subsequently, while unloading, the captain of the LADY ELLEN overheard a radio warning from an apparent lookout that small boats were speeding toward the site. When alerted about the approaching boats, the supervisor of the operation ordered the captain to sail the LADY ELLEN away from the dock, but the vessel was intercepted by a patrol boat waiting upstream.

Meanwhile, agents maintaining surveillance from the air observed several small boats sailing away from the LADY ELLEN and directed land units toward the place where those boats had docked. At about 5:00 a.m. the agents closed in on a clearing, where they observed a frame house, a newly-constructed fish house, and a newly constructed dock. They observed large trucks lined with plastic and pickup trucks with campers and loading devices. The agents also noticed a boat docked near the fish house that was stacked with bales of marijuana. Upon entering the frame house, they discovered petitioners Jackson, Jenkins and White, dressed in heavy work clothes and high rubber boots. On the table the agents saw various electronic devices, including a police scanner and a CB transmitter and receiver. They also saw a role of duct tape similar to that used on the plastic inside the trucks. The three petitioners were immediately arrested.

After the landing site was secured, federal and state officers left to look for suspects who might be fleeing via the only paved road with access to the site. The officers also had some knowledge of the apparent lookout at the bridge, and, from the size and nature of the smuggling operation, they expected to encounter lookouts and other participants in the area seeking escape. At 5:45 a.m., they stationed their car off the road three miles from the landing site and about seven-tenths of a mile from a dirt road leading to the site. The paved road ended, with no outlet, a few miles past the dirt road.

In the first hour, one car passed. It was stopped and the driver, a nurse on her way to work, was allowed to proceed. The second car stopped was a cream-colored 1972 Dodge. The officers, who were not in uniform, identified themselves as law enforcement officers. The driver, petitioner Talbert, was asked for his driver's license and automobile registration. He produced a North Carolina license and a car rental agreement showing that the car had been rented to a third party ("Leroy J. Edwards"); he told the officers that he was in the area for "hang gliding." The state officer arrested him on an alcohol charge. Subsequently, Talbert was implicated in the marijuana importation conspiracy.

As this questioning was being conducted, other police cars arrived on the scene. The police cars created a visible checkpoint area as a third car, driven by petitioner Herring, approached. The car was a grey, early-1970s model Plymouth. When Herring drove up to the police cars, he was asked for a license and car registration. He produced a Georgia driver's license and a rental agreement from the same car agency as Talbert's, showing that his car had also been rented in the name of "Leroy J. Edwards." When asked what he was doing in the area, he replied he was there to go "hang gliding." He then volunteered to go to Morehead City for photographing and fingerprinting, and was later implicated in the conspiracy.

ARGUMENT

1. Petitioners contend (Pet. 13-21) that the boarding of the LADY ELLEN violated their Fourth Amendment rights because it was unsupported by probable cause or reasonable suspicion to believe that there was marijuana aboard. But the absence of probable cause or reasonable suspicion does not establish that petitioners' Fourth Amendment rights were violated by the Coast Guard's

actions in this case. Contrary to petitioners' contention (Pet. 15), the evidence showed that the purpose of the Coast Guard patrol was to enforce all United States laws, including safety and documentation requirements, and not just those laws relating to narcotics smuggling (Pet. App. 4a, 19a). This Court has recently declined, on several occasions, to review similar claims that the Fourth Amendment was violated by warrantless and suspicionless boardings of vessels on the high seas by Coast Guard officers conducting safety and documentation checks. See *Erwin* v. *United States*, cert. denied, No. 79-579 (Feb. 19, 1980); *Warren* v. *United States*, cert. denied, No. 79-6217 (May 19, 1080); *Coats* v. *United States*, cert. denied, No. 79-1230 (Apr. 21, 1980).[2] There is no greater reason to grant review here.

Indeed, even if the Court were to decide that this issue might warrant review in an appropriate case, this is not such a case, for several reasons. To begin with, we think it plain that petitioners Rowe and Harper are the only ones who may assert this claim, since they are the only petitioners who were aboard the vessel at the time it was stopped. While others of the petitioners have claimed a proprietary interest in the LADY ELLEN,[3] the legal

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[2]Coats was a co-defendant of these petitioners, and his case involved the same boarding of the LADY ELLEN involved here. The court of appeals held that Coats did not have "standing" to contest the validity of the boarding. *United States* v. *Coats*, 611 F. 2d 37, 39-40 (4th Cir. 1979).

[3]Petitioners Govus, Jenkins, White, and Burdine filed vague and conclusory affidavits claiming a "proprietary" interest in the vessel and its cargo, but none testified at the suppression hearing or at trial concerning the nature of his interest. The government presented documentary proof that the owner of the LADY ELLEN was a person using the alias "Walter Poole." While the evidence indicated that petitioner Govus was one the organizers of the venture, entrusted with the responsibility of getting a boat to Colombia and back with a

challenge here is not to the search of the vessel, which was supported by probable cause,[4] but solely to the initial boarding. While that action affected the freedom of movement of the occupants of the vessel, constituting a "seizure" of their persons as well as of the vessel, it had no material impact on the property rights of the owners of the vessel. Having relinquished operation and control of the vessel to its crew, no interest of the owners was impaired by a brief interruption in the progress of the vessel, which could have occurred for any of a wide range of reasons. In sum, the mere stopping of a vessel on the high seas does not affect any Fourth Amendment right of its owners, and therefore they may not challenge its legality.

Moreover, while we believe that the Constitution permits random stops of vessels for safety and document inspections, this particular case does not involve the sort of unconstrained exercise of discretion that was present in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), where police officers made random stops of motor vehicles for

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load of marijuana, and that petitioners Jenkins, White and Burdine were recruited to unload the boat or serve as lookouts, it was not sufficient to show that any of them were more than employees working for a salary. As such, they would not have possessed a legitimate expectation of privacy in the vessel or its cargo. See *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 5-7; *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *United States* v. *Coats*, 611 F. 2d 37, 39-40 (4th Cir. 1979), cert. denied, No. 79-1230 (Apr. 21, 1980).

[4]The captain's spontaneous admission, immediately after the boarding, that there was marijuana aboard provided probable cause for a thorough search of the vessel. See *United States* v. *Rubies*, 612 F. 2d 397, 403 (9th Cir. 1979), cert. denied, No. 79-5954 (May 12, 1980); *United States* v. *Postal*, 589 F. 2d 862, 889-890 (5th Cir. 1979), cert. denied, No. 78-1714 (Oct. 1, 1979); *United States* v. *Odom*, 526 F. 2d 339, 342 (5th Cir. 1976). Petitioners do not contest the propriety of the search itself, but only the initial boarding of the LADY ELLEN.

registration checks. In *Prouse*, the Court specifically noted that "[q]uestioning of all oncoming traffic at roadblock-type stops" is one method of avoiding the vice of unconstrained discretion. 440 U.S. at 663; *id.* at 663-664 (Blackmun, J., concurring). As the court of appeals concluded (Pet. App. 7a, 9a), the stop of the LADY ELLEN satisfied the standards established in *Prouse* because it was performed as part of a neutral policy of stopping all American flag vessels under 250 feet in length that sailed through the Mona Passage.

Because in this case the boarding "was not one made at the will and whim of the officer in the field" (Pet. App. 7a), the decision below is not inconsistent with the decision of the Ninth Circuit in *United States* v. *Piner*, 608 F. 2d 358, 361 (1979), involving a totally random boarding of a pleasure vessel after dark for purposes of conducting a safety and documentation inspection. Nor does the decision below conflict with *United States* v. *Lee*, 274 U.S. 559 (1927). In *Lee*, this Court—relying on the doctrine of *Carroll* v. *United States*, 267 U.S. 132 (1925), with respect to automobiles—upheld a search and seizure of a vessel on the high seas by Coast Guard officers who had probable cause to believe that the vessel was being used to violate the laws of the United States. Obviously, the fact that vessels may, like automobiles, be searched upon probable cause says nothing about the question whether they may be stopped on terms more liberal than those governing the stops of automobiles.

2. Following their arrests aboard the LADY ELLEN, petitioners Rowe and Harper were promptly given *Miranda* warnings. The next morning, they were transferred to the ALERT and once again read their *Miranda* rights. Shortly thereafter, each petitioner was handed a *Miranda* warning card, containing a waiver of rights form at the bottom. Both petitioners signed their

individual waiver forms; at the pretrial hearing they acknowledged that they had understood their rights. After signing the waiver forms, each was questioned by a customs patrol agent and made inculpatory statements. The interview was recorded and signed. Later that evening, after the captain of the LADY ELLEN had expressed some interest in cooperating in a controlled delivery, petitioners were questioned by a DEA agent. Prior to this interrogation petitioners once again were given *Miranda* warnings. The questioning continued intermittently over the next few days as the ALERT sailed for North Carolina (Pet. App. 101a-102a).

Both petitioners contend (Pet. 24-25) that their statements were involuntary because: (1) they were fatigued from their voyage and got little sleep; (2) they were deliberately not taken before the nearest magistrate, in Puerto Rico, as they allege was required by Fed. R. Crim. P. 5; (3) they were promised consideration if they cooperated; (4) they were threatened with harsh sentences in Puerto Rico if they did not cooperate; and (5) they were told, when they asked about counsel, that they had to choose between seeing a lawyer in Puerto Rico and participating in the controlled delivery. The courts below properly rejected this largely fact-bound claim.

The night before they gave their statements to the customs officer, petitioners slept on pads on the mess deck of the LADY ELLEN. After being transferred to the ALERT, they slept on pads in the crew's area. The magistrate found that they were at all times "treated with due consideration and were accommodated as comfortably as was feasible under the crowded conditions and the fact that they did have to be guarded" (Pet. App. 104a). He concluded that "[t]he conditions of their confinement were not unreasonable and did not constitute oppressive treatment or duress which could have affected

the voluntariness of any statements made by them" (*ibid.*). There is no basis for questioning this finding.

Nor are petitioners aided by their claim that they were not promptly taken before a magistrate, in alleged violation of Rule 5. While delay prior to arraignment is a factor to be considered in determining voluntariness (see 18 U.S.C. 3501(b)(1)), the delay must be "unnecessary" before it will render a confession inadmissible. See *Mallory* v. *United States*, 354 U.S. 449, 455 (1957). Here, the magistrate found that petitioners voluntarily waived their right to be brought before the nearest magistrate and agreed instead to cooperate in the controlled delivery (Pet. App. 110a). Even absent a waiver, the courts below correctly determined that the delay was justified, since there was an appreciable risk that petitioners' appearance before the magistrate in San Juan would become known, jeopardizing not only the success of the controlled delivery, but petitioners' safety as well if they decided to cooperate (*id.* at 111a, 113a-114a). In these circumstances, the delay in bringing petitioners before a magistrate was not unnecessary. See *United States* v. *Odom*, 526 F. 2d 339, 343 (5th Cir. 1976).[5]

With respect to the alleged promises of consideration, the magistrate observed (Pet. App. 109a) that neither petitioner testified that any such promises were made and that the government's witnesses testified that petitioners were specifically told that they could not be given any promises in exchange for their cooperation in the

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[5]Moreover, we note that it is unlikely, even if the ALERT had steamed for Puerto Rico immediately after petitioners' arrests, that it would have arrived there by the time petitioners' initial statements were made to the customs agents the following morning (see Pet. App. 110a). Thus, even if the delay involved in making the controlled delivery was unnecessary, these statements were not the products of any such delay.

controlled delivery (*id.* at 105a-106a). Even if the officers had made statements about the harshness of sentences imposed in Puerto Rico for narcotics violations (but see Pet. App. 108a-109a), such statements would not have rendered petitioners' confessions involuntary, since petitioners were not threatened that they would be prosecuted in Puerto Rico if they did not confess to their role in the importation scheme. Finally, the suggestion—made after petitioners had already given their statements to the customs officer—that for the time being they would have to choose between seeing a lawyer at arraignment in Puerto Rico and participating in the controlled delivery (A. 838)[6] was simply an accurate description of the alternatives then open to them. If petitioners had been brought to Puerto Rico for arraignment, the success of the controlled delivery would have been compromised.

3. Petitioners Talbert and Herring contend (Pet. 21-23) that the stopping of their automobiles violated the Fourth Amendment because the officers lacked a reasonable suspicion that petitioners had violated the law. They therefore argue that the officers' testimony concerning the stops—which helped to establish petitioners' involvement in the narcotics conspiracy—should have been suppressed. The court of appeals correctly concluded (Pet. App. 12a-13a) that in the exigent circumstances presented here, the officers' actions constituted a reasonable means of apprehending individuals involved in the conspiracy.

The evidence showed that the raid at the landing site had interrupted a large smuggling operation and that suspects were dispersing from the scene. Anyone escaping from the site by car would have had to use the road on which the officers stationed themselves, since it was the

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[6]"A." refers to the appendix in the court of appeals.

only route leading away from the landing site. In addition, any lookouts seeking to return to the landing site also would have had to use the road. These facts permitted a reasonable suspicion that anyone travelling along this isolated road at 7:00 a.m. on a Sunday morning in early February was implicated in the importation scheme, justifying the minimal intrusion of a stop and a few routine questions.[7] See *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972); *Terry* v. *Ohio*, 392 U.S. 1, 20-23 (1968); *United States* v. *Jackson*, 448 F. 2d 963, 968-970 (9th Cir. 1971).[8]

4. Petitioner Michael Benjamin Forbes was apprehended by a deputy sheriff at about 7:30 a.m. on the morning of the raid as he was standing beside a road leading to his house near the landing site. Petitioners Jackson, Jenkins, and White, together with Forbes' father, Peter Forbes, had been arrested in the house earlier that morning. The deputy sheriff recognized petitioner as a resident of the dwelling. At the time, petitioner was wearing heavy foul weather gear and boots similar to those worn by the men who had been arrested inside the house. The deputy instructed him to get into the car, and they returned to the house, where DEA agents questioned petitioner about his recent whereabouts. After Forbes stated that he had been in Morehead City all night, he was placed under arrest (Pet. App. 57a; A. 743-746). Later in the day, while in jail, petitioner conversed

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[7]In the hour and a quarter during which the checkpoint was maintained, only one car other than petitioners' was observed. The driver, a nurse on her way to work, was questioned briefly and allowed to proceed.

[8]The cases on which petitioners rely (Pet. 23) are inapposite, since in those cases the officers did not have articulable suspicion that the defendants had violated the law.

with Paul Breslin, the captain of the LADY ELLEN, who identified Forbes by his voice as the pilot who had boarded the vessel at Morehead City (A. 847-848). Petitioner contends (Pet. 25-26) that he was arrested without probable cause and that Breslin's in—court identification of him based on the earlier voice identification was therefore inadmissible as the fruit of an unlawful arrest. We disagree.

The arrest was entirely lawful. The deputy who first spotted petitioner had reason to believe that members of the conspiracy had eluded capture and would be found in the area surrounding the landing site. Recognizing petitioner Forbes as an occupant of the house near the landing site, the deputy acted properly in briefly detaining petitioner and transporting him to the house for questioning by the DEA agents. See *Adams* v. *Williams*, *supra*; *Terry* v. *Ohio*, *supra*. The agents, who ascertained that petitioner lived in the house, knew that several persons discovered inside, including Forbes' father, had already been arrested. They also knew about the electronic equipment found in the house, and about the trucks, loading devices and boatload of marijuana outside. Moreover, like those arrested in the house, petitioner was wearing foul weather gear and boots. These facts, in addition to petitioner's statement that he had returned from Morehead City, which was seven or eight miles away (Gov't Br. 65), even though petitioner had no visible means of transportation, established probable cause to believe that petitioner was involved in the conspiracy.

5. Petitioners next contend (Pet. 26-28) that the district court failed to make a de novo determination of the magistrate's recommendations on the suppression motions. This claim is without merit. In *United States* v. *Raddatz*, No. 79-8 (June 23, 1980), slip op. 5-8, this Court

concluded that under 28 U.S.C. 636(b)(1), the district court is not obligated to rehear the testimony on which the magistrate based his findings and recommendations in order to make an independent evaluation of credibility. Thus, *Raddatz* disposes of petitioners' claim to the extent that they contend they were entitled to a de novo hearing before the district court. Petitioners' further contention that the district court did not review the transcript of the evidentiary hearing before ruling on their suppression claims is contradicted by the orders of the district court disposing of their motions (Pet. App. 49a, 94a).[9]

6. Petitioners Jackson, Jenkins, White, Talbert, and Herring contend (Pet. 30-35) that the evidence was insufficient to support their convictions. This fact-bound claim is mistaken. It is well settled that participation in a conspiracy may be shown by circumstantial evidence. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Thomas*, 586 F. 2d 123, 132 (9th Cir. 1978); *United States* v. *Frazier*, 584 F. 2d 790, 795-796 (6th Cir. 1978). Here, petitioners Jackson, Jenkins, and White were discovered at 4:00 a.m. in the dwelling near the landing site, dressed in heavy work clothes and high rubber boots and with assorted electronic equipment, including CB radios and police scanners. Outside the house was a boatload of marijuana, several trucks lined with plastic, and loading devices. These circumstances amply established that petitioners had attempted to monitor police activity in the area, that they had been in communication with other participants in the conspiracy, and that they were preparing to unload the marijuana from the small boats onto the waiting trucks.

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[9]With regard to petitioners' additional claim that the district court failed to dispose of the remainder of their suppression motions, we note that prior to trial the court overruled "all the other exceptions to the Magistrate's rulings" (Tr. 3550).

Petitioners Talbert and Herring were discovered several hours later operating motor vehicles on an isolated dead-end road near the landing site (see page 4, *supra*). Both cars had been leased from the same company by petitioner White under the same fictitious name (Pet. App. 88a-89a). The car driven by Talbert was of the same description as the lookout car that had been observed on a bridge with its headlights on when the LADY ELLEN approached the landing site; at the time of the stop, the car was coming from the direction of the bridge. There was an antenna mount on the trunk of the car, and a microphone in the front seat (Pet. App. 84a). Petitioner Herring's automobile was travelling from the direction of another lookout point north of the landing site (Gov't Ex. 22). Herring's fingerprints were found on one of the trucks outside the house (Gov't Ex. 42), and a notebook (Gov't Ex. 29) found inside the house contains numerous references to "Reagan" and "Neil" (Talbert's middle name is Regan and Herring's middle name is McNeill).

All petitioners except Harper, Rowe and Govus further contend (Pet. 28-30) that the conspiracy effectively terminated with the seizure of the LADY ELLEN or upon its entry into United States customs waters, when, they allege, the importation was accomplished, and that the evidence was insufficient to establish their involvement prior to those events. While it is true that the conspiracy terminated as far as Rowe and Harper were concerned when the vessel was seized, and their participation in the controlled delivery was thus not in furtherance of the conspiracy, the other petitioners were unaware of the seizure. For them, the conspiracy was still alive at the time of their involvement.[10]

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[10]Petitioners' reliance on *Fiswick* v. *United States*, 329 U.S. 211 (1946), and *United States* v. *Izzi*, 613 F. 2d 1205 (1st Cir. 1980), is

Nor did the importation conspiracy terminate when the LADY ELLEN first entered United States customs waters. It was an integral part of the conspiracy that the marijuana would thereafter be transferred onto small boats for transport to shore, where it would be loaded onto waiting trucks. Petitioners' participation in the operation at the unloading stage was plainly sufficient to implicate them in the importation conspiracy. See *United States* v. *Reynolds*, 511 F. 2d 603, 607 (5th Cir. 1975).[11]

7. Petitioners also contend (Pet. 35-41) that the jury selection plan of the United States District Court for the Eastern District of North Carolina deprived them of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* As noted in the petition (Pet. 36 n.13), after the district court denied the challenge to the jury

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misplaced. In *Fiswick*, this Court stated that a confession terminates a conspiracy only "[s]o far as each conspirator who confessed [is] concerned * * *" (329 U.S. at 217), thus implying that the conspiracy continues with respect to the remaining conspirators. In *Izzi*, the court held that where there had been a substantial hiatus of activity in a narcotics conspiracy, an additional transaction instigated by the government through a cooperating co-conspirator was not a continuance of the initial conspiracy. Here, the actual importation of the marijuana, though "controlled" by the government, was part of the initial scheme, as were petitioners' activities in preparing for the receipt and distribution of the shipment; these activities were not part of an additional transaction.

[11]In *United States* v. *Alfrey*, 612 F. 2d 180, 186 (5th Cir. 1980), defendant Kennedy was found in street clothes on board a trawler carrying marijuana after it had entered United States waters. The court concluded that he had become involved shortly before his arrest and that the evidence was insufficient to establish that he knew of the importation conspiracy or intended to join it; however, the court did affirm Kennedy's conviction for possession with intent to distribute the marijuana. Here, the evidence showed that petitioners were actively involved in the unloading phase of the importation conspiracy.

selection procedure, all petitioners other than petitioner Herring waived their rights to a jury trial and withdrew their motions relating to the composition of the grand and petit juries. Petitioner Herring also waived his right to a jury trial, but reserved his right to raise the jury selection challenge on appeal (Tr. 3535-3536). This Court recently declined to review an identical claim, based on essentially the same data, in *Coats* v. *United States*, cert. denied, No. 79-1230 (Apr. 21, 1980). For the reasons stated in our brief in opposition in *Coats* (at 7-12),[12] the jury selection plan of the Eastern District of North Carolina comports with statutory and constitutional requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1980

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[12]We are sending petitioner Herring's counsel a copy of our brief in opposition in *Coats*.

DOJ-1980-07